

# The Abuse of Section 1115 Waivers: Welfare Reform in Search of a Standard

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Although urban problems extend far beyond the welfare system,<sup>1</sup> policy-makers persist in linking inner city problems with the Aid to Families With Dependent Children (AFDC) program.<sup>2</sup> Hence, the rhetoric blames teen pregnancy, high school dropout rates, urban slums, and drug use on the availability of welfare benefits.<sup>3</sup> Furthermore, in recent years the recessionary economy and the impact of reduced federal spending<sup>4</sup> on state budgets have led us to embrace the notion of no-cost solutions to complex problems. In combination, political rhetoric and budget constraints have nurtured the belief that we can solve the intractable problems of urban decay and poverty by simply withholding welfare benefits.

Such withholding is not allowed under the state plan requirements of federal law.<sup>5</sup> However, through the use of a technical and seemingly innocuous research provision contained in section 1115 of the Social Security Act,<sup>6</sup>

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1. CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* 130-31 (1992); Thomas Corbett, *Child Poverty and Welfare Reform: Progress or Paralysis?*, FOCUS, Spring 1993, at 8 ("Perceptual reductionism—the tendency to assume that part of the population or problem represent the whole—is a powerful determinant of the character of the public [welfare] debate."); William Julius Wilson & Kathryn M. Neckerman, *Poverty and Family Structure: The Widening Gap Between Evidence and Public Policy Issues*, in *FIGHTING POVERTY, WHAT WORKS AND WHAT DOESN'T* 232, 252-56 (Sheldon H. Danziger & Daniel H. Weinberg eds., 1986).

2. Tommy Thompson, *Time to Change the Welfare System*, ST. LOUIS POST-DISPATCH, Dec. 14, 1992, at 3B ("As governor of Wisconsin, I have been waging my own anti-socialist revolution against a welfare system that has devastated once strong and vibrant urban communities.").

3. See, e.g., Charles Krauthammer, *Subsidized Illegitimacy*, WASH. POST, Nov. 19, 1993, at A29 ("[T]he only realistic way to attack this cycle of illegitimacy and its associated pathologies is by cutting off the oxygen that sustains the system: Stop the welfare checks."); Charles Murray, *The Time Has Come to Put a Stigma Back on Illegitimacy*, SACRAMENTO BEE, Nov. 7, 1993, at F1; LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY* 1-24 (1992).

4. In fiscal year 1978, federal grants to state and local governments amounted to 17% of all federal outlays and 3.6% of gross domestic product. By 1989, the grant level had fallen to 10.7% of federal outlays and 2.6% of gross domestic product. In recent years, these levels have increased slightly. OFFICE OF MGMT. & BUDGET, *HISTORICAL TABLES, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1994*, 174 (1993).

5. *King v. Smith*, 392 U.S. 309, 333 (1968) (interpreting 42 U.S.C. § 602(a)(10) (Supp. III 1991), which requires a state's plan to furnish "aid to families with dependent children . . . with reasonable promptness to all eligible individuals," to prohibit states from varying the categorical eligibility standards established by the Social Security Act).

6. 42 U.S.C. § 1315(a) (Supp. III 1991).

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the federal executive branch has waived a number of congressionally enacted entitlement provisions. These waivers have allowed states to reduce or cut off benefits to thousands of otherwise eligible AFDC mothers and children who do not comply with prescribed behavior.

Given the sorely inadequate AFDC benefit level,<sup>7</sup> additional benefit reductions are devastating for AFDC families. Numerous studies have shown the impact of inadequate income on mental health, infant mortality, low-birth-weight children, skipped meals, malnutrition and its resulting health problems, and learning/developmental disabilities.<sup>8</sup>

This Article will document the federal government's relinquishment, in the name of experimentation, of any obligation to set welfare policy, and the abuse of section 1115 waivers in terms of both methodology and substantive result. In Part I, I explore the historical purpose of section 1115, which was to provide for limited research projects. Parts II and III critique the abuse of section 1115 through broad-based executive waiver approvals, and show how these waiver approvals have resulted in wholesale alterations of the AFDC program by the states. Finally, Part IV focuses on the reasons why unrestricted state discretion is not an appropriate strategy for addressing welfare policy concerns.

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7. CENTER ON SOCIAL WELFARE POLICY AND LAW, *LIVING AT THE BOTTOM: AN ANALYSIS OF AFDC BENEFIT LEVELS 11-14 (1993)* (AFDC monthly benefit levels for a family of three in the 49 contiguous states range from \$120 in Mississippi to \$633 in Los Angeles, California, all well below the poverty level).

8. *Study of Poor Children Shows a Painful Choice: Heat over Food*, N.Y. TIMES, Sept. 9, 1992, at A17 (discussing Boston City Hospital study documenting increase in low-weight babies admitted to emergency rooms in the winter because families have to divert food money to buy fuel); William S. Nersesian et al., *Childhood Death and Poverty: A Study of All Childhood Deaths in Maine, 1976-1980*, 75 PEDIATRICS 41, 48 (1985) (finding that children on social welfare programs died of disease-related causes at a rate 3.5 times that of other children); Edward G. Stockwell et al., *Economic Status Differences in Infant Mortality by Cause of Death*, 103 PUB. HEALTH REP. 135, 137 (1988) (gap between rate of infant mortality in poor and nonpoor families is widening); David Wood et al., *Health of Homeless Children and Housed, Poor Children*, 86 PEDIATRICS 858, 862 (1990) (demonstrating high levels of childhood "morbidity" and ill health in poor children); Steven Parker et al., *Double Jeopardy: The Impact of Poverty on Early Childhood Development*, 35 PEDIATRIC CLINICS N. AM. 1227, 1231 (1988) (finding that low socioeconomic status increases the risk of contracting cytomegalovirus, which leads to lower IQ scores and 2.7 times more school failure than in matched controls and noting "[i]n contrast, these outcomes were not seen for infected infants of middle or upper class backgrounds."); J.S. Chopra & Arun Sharma, *Protein Energy Malnutrition and the Nervous System*, 110 J. NEUROLOGICAL SCI. 8 (1992) (linking protein energy malnutrition, a natural ramification of poverty, to significant abnormalities in motor and sensory nerve conduction, resulting in learning deficits and behavioral problems).

# I. THE CONGRESSIONAL PURPOSE BEHIND EXECUTIVE WAIVERS OF STATUTORY ENTITLEMENT PROVISIONS

The Social Security Act, enacted in 1935,<sup>9</sup> sets forth specific federal requirements that each state plan must contain in order to receive matching federal reimbursement for benefits paid under the AFDC program.<sup>10</sup> In 1962, Congress added section 1115 to the Social Security Act, providing:

In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of subchapter I, VI, X, XIV, or XIX of this chapter, or Part A of subchapter IV of this chapter, in a State or States . . . the Secretary may waive compliance with any of the requirements of section 302, 602, 802, 1202, 1352, 1382, or 1396a of this title, as the case may be, to the extent and for the period he finds necessary to enable such State or States to carry out such project . . . .<sup>11</sup>

Thus, this section allows the federal executive branch, through the Secretary of the U.S. Department of Health and Human Services (HHS),<sup>12</sup> to waive a state's compliance with many federal AFDC<sup>13</sup> statutory entitlement provisions in order for the state to run demonstration projects.

Executive waivers, however, are subject to certain restrictions. HHS must determine that the demonstrations promote the objectives of the AFDC program set forth in the Social Security Act. These objectives include "encouraging the care of dependent children in their own homes," helping "maintain and strengthen family life," and helping "such parent or relatives to attain or

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9. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.).

10. 42 U.S.C. § 602 (1988 & Supp. III 1991).

11. Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 122, 76 Stat. 172, 192 (codified as amended at 42 U.S.C. § 1315) (redesignated as § 1315(a) in 1977 by Pub. L. No. 95-216, § 404, 91 Stat. 1509, 1562 (1977)).

Congress has also passed numerous specific provisions authorizing demonstration projects of various types, *e.g.*, 42 U.S.C. § 602(a)(7)(c)(i) (1988) (authorizing waivers of monthly reporting of budgeting methods to create consistency between AFDC and Food Stamps); 42 U.S.C. § 1315(c)(1) (1988) (authorizing child support demonstrations which are "designed to improve the financial well-being of children or otherwise improve the operation of the child support program"); 42 U.S.C. § 1315(d) (1988) (authorizing AFDC-UP programs testing different definitions of unemployment, and specifically exempting the projects from being statewide); now obsolete 42 U.S.C. § 1315(b)(1)(A) (1988) (authorizing three public service employment projects, but stating that only one may be on a statewide basis); Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 8015, 103 Stat. 2106, 2465 (1989) (authorizing Minnesota Family Investment Plan); Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9121, 101 Stat. 1330, 1330-310 (1987) (authorizing Washington Family Independence Program); Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2309, 95 Stat. 357, 850 (1981) (authorizing Work Incentive Demonstration Programs), but these are beyond the scope of this Article.

12. The Department of Health, Education and Welfare (HEW) was redesignated as the Department of Health and Human Services in 1980 by the Department of Education Organization Act, 20 U.S.C. § 3508 (1988). Throughout this Article, I have referred to the agency as "HHS," except when it is chronologically correct to designate it "HEW."

13. Although § 1115 allows the executive branch to waive the requirement of a number of other federal programs as well, I will focus on AFDC waivers in this Article.

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retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.”<sup>14</sup>

The limited legislative history of section 1115 suggests that Congress intended the waivers to support projects testing new methods of administration and delivery of the program benefits. The report of the Senate Finance Committee provided:

Projects to be initiated are expected to be selectively approved by the Department and to be those which are designed to improve the techniques of administering assistance and the related rehabilitative service under the assistance titles.<sup>15</sup>

The section of the bill that established 1115 waivers was one of three sections contained under the heading of “Improvement in Administration Through Demonstrations, Training, and Public Advisory Groups,” along with a section creating an advisory council on public welfare to study the administration of various programs and a section providing additional funds for training welfare staff.<sup>16</sup>

At the time of enactment, then Secretary of Health, Education and Welfare (HEW) Abraham Ribicoff summarized the purpose of the waiver, stating that section 1115 “would make it easier for States to embark on imaginative pilot or demonstration projects which could lead to improved *operations*.”<sup>17</sup>

The focus of the bill was the provision of better services for recipients, not reduction of benefits.<sup>18</sup> Secretary Ribicoff testified to the Administration’s

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14. 42 U.S.C. § 601 (1988).

15. S. REP. NO. 1589, 87th Cong., 2d Sess. 20 (1962), *reprinted in* 1962 U.S.C.C.A.N. 1943, 1962. See also HEW testimony describing the bill to the House Committee: “Experimentation and demonstration of new methods of administering public welfare more effectively would be encouraged under provisions of the draft bill.” *Public Welfare Amendments of 1962: Hearings on H.R. 10032 Before the House Comm. on Ways and Means*, 87th Cong., 2d Sess. 3 (1962) (statement of Abraham Ribicoff, Secretary, Department of Health, Education and Welfare); “We need to make constant efforts to find still more effective ways of providing welfare services.” *Id.* at 172; “The complex and varied problems of administration of public welfare programs can be solved only by fresh and imaginative approaches. Provision for waiver of plan requirements and some further Federal help with financing should serve as incentives to States to venture out into much needed experimentation with new methods and procedures.” *Id.* at 638 (statement of Barbara Coughlan, Director, Nevada State Welfare Department).

16. Public Welfare Amendments of 1962, Pub. L. No. 87-543, pt. B, 76 Stat. 172. Indeed, Part A of Title I of the Public Welfare Amendments of 1962, which contained no language regarding demonstration projects, covered the improvement of service to reduce dependency. *Id.* at pt. A.

17. *Public Assistance Act of 1962: Hearings on H.R. 10606 Before the Senate Comm. on Finance*, 87th Cong., 2d Sess. 141 (1962) [hereinafter *Hearings*] (statement of Abraham Ribicoff, Secretary, Department of Health, Education, and Welfare) (emphasis added).

18. “The Committee on Finance, to whom was referred the bill (H.R. 10606) to extend and improve the public assistance and child welfare services program of the Social Security Act . . . .” S. REP. NO. 1589, *supra* note 15, at 1, *reprinted in* 1962 U.S.C.C.A.N. at 1943 (emphasis added). The Senate Report stated that this bill would allow waivers for “demonstration projects designed to improve the public assistance program . . . .” *Id.* at 1947.

In appropriating additional funds for § 1115 projects in 1967, Congress again stated that the money was “to develop demonstrations in improved methods of providing service to recipients or in improved methods of administration.” S. REP. NO. 744, 90th Cong., 1st Sess. 30 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2834, 2863; *see also id.* at 3006 (discussing “ways of improving the quality of administra-

beneficent intentions in supporting the Public Assistance Act of 1962, which contained section 1115:

The President in his welfare message to the Congress observed that communities which have attempted to save money on welfare expenditures through ruthless and arbitrary cutbacks have met with little success.

[The President] said:

... but communities which have tried the rehabilitative road—the road I have recommended today—have demonstrated what can be done with creative, thoughtfully conceived and properly managed programs of prevention and social rehabilitation, in those communities, families have been restored to self-reliance, and relief roles have been reduced.<sup>19</sup>

At the committee hearing, no witness suggested—nor did the Finance Committee ever intimate—that section 1115 was to be used to reduce benefits by varying eligibility criteria.<sup>20</sup> In fact, the types of limited pilot projects which were presented to the Finance Committee included those testing the benefits of better trained caseworkers under competent supervision with manageable caseloads, those allowing recipients to retain more of their earnings prior to benefit reduction, and those using reduced caseloads and concentrated casework to strengthen family life, bring separated parents back together, and help welfare recipients get paid jobs.<sup>21</sup>

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tion and to further assist the needy to become self-supporting or better able to care for themselves") (emphasis added).

19. *Hearings*, *supra* note 17, at 109 (statement of Abraham Ribicoff, Secretary, Department of Health, Education, and Welfare); *see also id.* at 141 (emphasizing that experimentation could improve operations and streamline administration); *id.* at 79 (containing Report of Ad Hoc Comm. on Pub. Welfare, to the Secretary of Health, Education, and Welfare (1961) (again promoting efficiency, "new and better methods," and integration of services as the goals of experimentation)); *id.* at 239 (statement of Marvin E. Larson, member of Board of Directors, American Public Welfare Association) (stating that demonstration projects could contribute "to the improvement of public assistance administration" but noting that experimentation is only permitted "under prescribed and limited conditions").

20. HEW's contemporaneous practice supports this point. At the time § 1115 was enacted, HEW did not consider federal eligibility criteria mandatory on the states and, indeed, had approved numerous state plans which contained exclusions of women and children who were otherwise eligible under the federal statutory language. For example, HEW allowed states to exclude children who were suspended from school, mothers who refused to have a psychiatric exam, and children of mothers who were deemed able to work although they could not find a job, subject only to the "condition x" standard that the exclusions not be irrational or arbitrary in light of the Social Security Act's purposes. Edward V. Sparer, *The Right to Welfare, in THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE* 65, 68 (Norman Dorsen ed., 1971); *see also* Matthew Zwerling, *Welfare's "Condition X,"* 76 YALE L.J. 1222 (1967) (discussing the statutory and constitutional authority for "condition x" and its possible application to determine the constitutionality of state welfare programs).

Only in 1968 did the Supreme Court find that § 402(a)(10) (a waivable provision under § 1115) required states to pay benefits to all individuals who were eligible under the federal statutory language. *King v. Smith*, 392 U.S. 309, 330-33 (1968). HEW disagreed with this opinion and continued for some years thereafter to argue that states could exclude otherwise eligible recipients subject only to an HEW determination that the exclusion did not violate "equitable treatment." Sparer, *supra*, at 68.

21. *Hearings*, *supra* note 17, at 312-14 (statement of Joseph H. Reid, Executive Director, Child Welfare League of America).

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Two further points important to our discussion emerge from the record. First, Congress appears to have intended that the projects implemented pursuant to the waiver provision be limited in scope. While the AFDC program requires that the state plan provisions apply statewide,<sup>22</sup> the Senate Report stated that this would need to be waived in most demonstration projects.<sup>23</sup> Second, a later Senate Report indicated that duplication of such projects should be avoided.<sup>24</sup>

In short, both the limited legislative history and lack of fanfare accompanying the passage of section 1115 indicate that Congress and the Administration intended this section to be a narrow, technical, and beneficent research option.

## II. FEDERAL EXECUTIVE ABUSE OF SECTION 1115 WAIVERS

Over the thirty years of implementation of section 1115 waivers, HHS policy has shifted from approval of confined administrative and service-oriented projects to a radical misuse of waivers that has substantially undermined the federal AFDC eligibility criteria.<sup>25</sup> In order to do this, HHS ultimately promulgated regulations that rejected the opinions of leading authorities about the standard protections that should be employed when conducting research on welfare recipients.

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22. 42 U.S.C. § 602(a)(1) (1988).

23. "One such requirement, for example, is that the plan be in effect throughout the State. A demonstration project usually cannot be statewide in operation. For this reason, under the bill the Secretary would be authorized to waive plan requirements . . . ." S. REP. NO. 1589, *supra* note 15, at 19, *reprinted in* 1962 U.S.C.C.A.N. at 1961.

24. S. REP. NO. 744, *supra* note 18, at 169, *reprinted in* 1967 U.S.C.C.A.N. at 3006.

25. Courts have given wide discretion to the secretary in approving waiver requests and have rejected the argument that § 1115 waivers could not be granted to "diminish any statutory rights or entitlements." *Aguayo v. Richardson*, 352 F. Supp. 462, 470 (S.D.N.Y. 1972), *aff'd*, 473 F.2d 1090, 1104-05 (2d Cir.), *cert. denied*, 414 U.S. 1146 (1973) (challenge to New York demonstration project requiring all "employable" members of families receiving AFDC to register for training and employment and to accept a referral to a training program, to a job in the public or private sector, or to one established by the program); *Phoenix Baptist Hosp. and Medical Ctr. v. United States*, 728 F. Supp. 1423, 1427-28 (D. Ariz. 1989) (challenge to Arizona project rejecting the Medicaid reimbursement model, and instead entering into agreements with four "prime contractors" to receive a flat rate for each indigent person assigned to the contractor, and in exchange to provide all necessary medical care); *Georgia Hospital Ass'n v. Dep't of Medical Assistance*, 528 F. Supp. 1348, 1355 (N.D. Ga. 1982) (challenge by Georgia hospitals to Georgia project implementing an alternative reimbursement system to hospitals for Medicaid); *Crane v. Mathews*, 417 F. Supp. 532, 539 (N.D. Ga. 1976) (challenge to Georgia demonstration project requiring copayment for certain Medicaid services to apply to all AFDC recipients except children in foster care); *California Welfare Rights Org. v. Richardson*, 348 F. Supp. 491, 493-95 (N.D. Cal. 1972) (challenge to the "California co-payment experiment," requiring Medi-Cal recipients not receiving cash assistance, earning income in addition to their cash assistance, or possessing resources above certain levels to copay for some medical services).

In so ruling, however, courts commented on the time-limited nature of the demonstrations and the fact that the experiments were for a limited group of recipients. *Aguayo*, 352 F. Supp. at 470; *California Welfare Rights Org.*, 348 F. Supp. at 498.

*A. Shift in Nature and Scope of Projects Receiving Waiver Approvals*

Consistent with legislative intent, HEW's early waivers<sup>26</sup> were largely directed toward administrative innovations to improve the service delivery of the program or small projects extending social services. For example, between 1963 and 1972, HEW approved at least twenty-five child care development programs, and more than forty programs to integrate services by coordinating and expanding social services and various benefit programs. At least twenty projects involved caseworker training.<sup>27</sup>

HEW initially stated that the purpose of the waivers was "to develop and improve the methods and techniques of administering assistance and related services designed to help needy persons achieve self-support or self-care or to maintain and strengthen family life."<sup>28</sup> Several years later, HEW reiterated this purpose and suggested examples of possible 1115 waivers, all of which involved an expansion of benefits or administrative innovation. According to HEW, the waiver could help:

provide assistance to needy individuals who would not otherwise be eligible; increase the level of payments; provide social services not presently available, including such complementary services as homemaking and home management; experiment with new patterns and types of medical care; test new approaches to staff development; permit purchase of services or other financial arrangements when necessary services for needy individuals are not available in public welfare agencies; or, involve new methods of improving any aspect of public assistance administration, including administrative methods, policies, and procedures.<sup>29</sup>

Furthermore, in seeking additional funds for section 1115 demonstration projects in 1967, HEW described the first five years of the waiver authority:

Five years ago, the Congress established a program under the Social Security Act to support demonstration grants in the area of public assistance. The program has become a valuable tool for improving welfare services and administration. By January of this

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26. HHS was unable to provide the author with original copies of all waiver approvals despite a long-standing Freedom of Information Act request. However, through other sources I was able to obtain a list of all waivers approved for 1962-1973, 1981-1985, 1987, and 1989-1992. For the missing years, I have relied on references to waivers in litigation and scholarly writing, the HHS waiver priorities listed in the Federal Register from 1978-1983, and conversations with experts who were closely following the waiver process during the relevant time. I have been able to obtain and review copies of the complete federal approvals (and in some cases the state applications as well) for many waivers granted for 1985-1992.

27. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SECTION 1115 DEMONSTRATION PROJECTS APPROVED: JULY 1, 1963—JULY 1, 1972 (1972) (on file with author); DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, DEMONSTRATION PROJECTS BRANCH, DEMONSTRATION PROJECTS IN PUBLIC ASSISTANCE (SECTION 1115 OF THE SOCIAL SECURITY ACT): PROGRAM AND FISCAL REPORT FOR FISCAL YEAR 1968 (1968) (on file with author).

28. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, H.T. No. 4, pt. IV, § 8421 (1963).

29. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, H.T. No. 109, pt. IV, § 8432 (Feb. 17, 1967).

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year, 164 projects had been approved. Projects supported to date have dealt with more efficient ways of administering public assistance; tested the effect of administering public assistance; tested the effect of earned income exemptions as incentives to work; and experimented with the development of new ways of providing services.<sup>30</sup>

In the early 1970s, although the vast majority of waivers continued in the same vein, HEW granted a limited number of waivers that resulted in a potential loss of benefits for recipients:<sup>31</sup> several waivers were approved allowing states to run demonstrations involving mandatory jobs programs with AFDC reductions for those who failed to participate.<sup>32</sup> Indeed, one demonstration was approved which required up to three dollars a month in copayment for medical care for some recipients.<sup>33</sup> However, these projects were restricted in scope and duration: The California Co-Payment Experiment was for one year, with a possible six-month extension, and applied only to individuals with income or resources over a certain limit;<sup>34</sup> the New York Public Service Work Opportunities Project operated in fourteen counties covering twenty-five percent of the state's AFDC cases for one year;<sup>35</sup> the New York Incentives for Independence Project operated in only three counties, covering 2.5% of the state's AFDC and state-run Home Relief recipients for one year.<sup>36</sup>

Between 1978 and 1983, HHS decided not to promulgate regulations setting

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30. *Social Security Amendments of 1967: Hearings on H.R. 12080 Before the Senate Comm. on Finance*, 90th Cong., 1st Sess. 271 (1967) (statement of Wilbur Cohen, Under Secretary, Department of Health, Education, and Welfare); see also *id.* at 1126 (statement of Hon. John V. Lindsay, Mayor, City of New York) (noting the success of a training program that provided child care to all participants and suggesting the expansion of child care provision).

31. The unusual nature of these waivers was noted by the court in subsequent litigation of a copayment project:

It is maintained, essentially without contradiction, that no project which would have resulted in a lowering of the level of benefits has ever been approved, prior to this California project. Curiously, there is no showing whatsoever, that any state had ever proposed such a project before, much less that such a proposal had been rejected by the Secretary.

*California Welfare Rights Org. v. Richardson*, 348 F. Supp. 491, 495 (N.D. Cal. 1972).

32. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SECTION 1115, DEMONSTRATION PROJECTS APPROVED (1972), *supra* note 27, at 13 (discussed in *Aguayo v. Richardson*, 473 F.2d 1090, 1094-96 (2d Cir. 1973)).

33. *Id.* at 2 (discussed in *California Welfare Rights Org.*, 348 F. Supp. at 494).

34. *California Welfare Rights Org.*, 348 F. Supp. at 494-95.

35. *Aguayo*, 473 F.2d at 1094.

36. *Id.* at 1095. During this period, HEW also approved waivers for the highly analyzed negative income tax and income maintenance experiments in New Jersey, Pennsylvania, Washington, Colorado, Indiana, North Carolina, and Iowa, which guaranteed participants payments bringing their income to a level expressed as a percentage of the poverty line. These programs drew from a range of populations: some enrolled single mothers; others focused on working two-parent families. Joseph Heffernan, *Negative Income Tax Studies: Some Preliminary Results of the Graduated-Work-Incentive Experiment*, 46 SOC. SERV. REV. 1 (1972); Robert A. Moffitt & Kenneth C. Kehrner, *The Effect of Tax and Transfer Programs on Labor Supply*, in 4 RES. LAB. ECON. 103 (1981); Felicity Skidmore, *Operational Design of the Experiment*, in WORK INCENTIVES AND INCOME GUARANTEES: THE NEW JERSEY NEGATIVE INCOME TAX EXPERIMENT 25 (Joseph A. Pechman & P. Michael Timpane eds., 1975).



forth standards and procedures for section 1115 waivers,<sup>37</sup> and instead published "Federal Register notices annually to inform the public of the kinds of projects that may be funded under [1115] and the specific requirements and procedures for making awards."<sup>38</sup> Prior to 1981, these notices largely limited priority areas for waiver approvals to administrative initiatives.<sup>39</sup>

Beginning in 1981, pursuant to specific congressional authority,<sup>40</sup> the Reagan Administration began giving large numbers of waivers of the federal entitlement provision<sup>41</sup> to test employment-related activities, including job search, community work experience, and grant diversion to subsidize employment.<sup>42</sup> Although welfare-to-work demonstrations constituted the majority of waivers granted from 1981 to 1987, HHS continued to grant waivers for a number of administrative projects, including error-rate reduction and coordinated administration of AFDC and Food Stamps.<sup>43</sup>

However, in the mid-1980s, consistent with an earlier proposal to distribute AFDC funds within block grants and convert the program into a wholly state-run and state-financed effort,<sup>44</sup> President Reagan announced a total revamping

37. Special Section 1115 Demonstration Projects, Notice of Proposed Rulemaking, 41 Fed. Reg. 5132 (1976); Withdrawal of Notices of Proposed Regulations Formalizing Requirements and Procedures for Research and Demonstration Grants, 44 Fed. Reg. 18,054 (1979).

38. 44 Fed. Reg. 18,054 (1979).

39. For example, the 1978 priorities included fraud control technique, electronic fund transfer of benefits to bank accounts, automation of eligibility determination, management improvement, child support case preparation, state procedures in determining incapacity, and analysis of local welfare office administration procedures. 43 Fed. Reg. 17,061 (1978); *see also* 48 Fed. Reg. 21,202 (1983); 47 Fed. Reg. 31,079 (1982); 46 Fed. Reg. 30,895 (1981); 45 Fed. Reg. 31,924 (1980); 44 Fed. Reg. 27,614 (1979). The only variation from administrative priorities listed in the Federal Register priorities was the implementation of welfare-to-work demonstrations congressionally authorized in 1981. Omnibus Budget and Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357.

In addition, a 1980 HHS memo, in describing the types of 1115 projects which would be favorably considered, reiterated the beneficent intent of the projects:

A general policy of HEW in granting waivers is that the welfare recipient should be as well off or better off than he would be if there was no project. With this policy in mind, there are sub-units within Section 402 that the Secretary has authority to waive but does not exercise that authority in order to preserve the rights of recipients.

DIVISION OF FAMILY ASSISTANCE STUDIES, SOCIAL SEC. ADMIN., SECTION 1115 INNOVATIVE WELFARE PILOT PROJECTS—WAIVING PORTIONS OF THE SOCIAL SECURITY ACT FOR AID TO FAMILIES WITH DEPENDENT CHILDREN AND RELATED PROGRAMS (1980) (on file with author).

40. Omnibus Budget and Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981).

41. 42 U.S.C. § 602(a)(10) (1988). Without a waiver of 602(a)(10)(A), the state cannot deny benefits to individuals who meet these federal requirements. *See supra* note 5.

42. From 1981 to 1985, HHS approved 41 employment-related waivers. DIVISION OF FAMILY ASSISTANCE STUDIES, SOCIAL SEC. ADMIN., AFDC RESEARCH AND DEMONSTRATION PROJECTS IN FISCAL YEAR 1981-85 (on file with author).

43. Seven approved projects tested error reduction methods; five experimented with consolidation of AFDC and Food Stamps. *Id.*

44. David S. Broder & Spencer Rich, *Block Grant Plan Would Replace U.S. Welfare Payments*, WASH. POST, Aug. 13, 1981, at A1. Linda E. Demkovich, *Political, Budget Pressures Sidetrack Plan for Turning AFDC Over to States*, 13 NAT'L J. 1671 (1981). This is consistent with the overall conservative/federalist downsizing of the federal government and decentralization of programs popularized by conservative think tanks and made prevalent in the Reagan Administration. Robert Rector, *Welfare Reform That is Anti-Work, Anti-Family, Anti-Poor*, 603 HERITAGE FOUND. BACKGROUNDER, Sept. 23, 1987, at 11. For a fuller discussion of Reagan's block grant strategy, see GEORGE E. PETERSON ET AL., THE

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of the AFDC program through "state-sponsored, community-based demonstration projects."<sup>45</sup> To facilitate this initiative, the Administration redesigned and simplified the structure of the waiver process,<sup>46</sup> establishing a Low Income Opportunity Advisory Board to expedite state requests for waivers of multiple programs and to recommend action to the secretaries of each relevant department.<sup>47</sup>

The Low Income Opportunity Advisory Board was to consider whether the waiver request: (1) was consistent with the policy goals set forth in *Up From Dependency*, the 1987 report issued by the Domestic Policy Council Low Income Opportunity Working Group;<sup>48</sup> (2) was cost-neutral; and (3) had an adequate evaluation component.<sup>49</sup> The evaluation was to measure the net effect on dependency, i.e., whether people left the welfare rolls, and the cost effectiveness of the project. Noticeably absent from the evaluation criteria was any notion of assessing harm to the affected recipients.<sup>50</sup> A policy analyst from the conservative Heritage Foundation stated that "[t]hough the Board has attracted scant press and public attention since its creation in 1987, it is one of the most important gains for federalism in recent years."<sup>51</sup>

One of the first two waivers processed through the Low Income Opportuni-

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REAGAN BLOCK GRANTS: WHAT HAVE WE LEARNED? (1986).

45. Ronald Reagan, Address on the State of the Union 6 (Jan. 27, 1987) (transcript available from the Bureau of Nat'l Affairs, Inc.).

46. Stuart M. Butler, *How the White House Spurs Welfare Reform*, 705 HERITAGE FOUND. BACKGROUNDER, May 4, 1989, at 3; Rector, *supra* note 44, at 11.

47. THE WHITE HOUSE, THE INTERAGENCY LOW INCOME OPPORTUNITY ADVISORY BOARD PROCEDURES FOR COORDINATION AND REVIEW OF STATE WELFARE REFORM DEMONSTRATION PROPOSALS AND WAIVER REQUESTS (Nov. 30, 1987) (on file with author).

48. The report of the Low-Income Opportunity Working Group strongly recommended widespread, long-term state and local experimentation with welfare programs to accomplish very general goals such as reducing dependency on welfare, encouraging economically self-reliant families, making individualized determinations of need, and making work more rewarding than welfare. DOMESTIC POLICY COUNCIL LOW INCOME OPPORTUNITY WORKING GROUP, *UP FROM DEPENDENCY: A NEW NATIONAL PUBLIC ASSISTANCE STRATEGY* 5, 51-53 (1986). The report specifically put forth the idea of withholding welfare as a means of controlling behavior:

A centralized system bypasses normal community patterns and support. Federal aid now goes to individuals and households as a right, regardless of their attachment to any community norms or standards. Because the community provides no benefits, it can rarely enforce any mutual responsibility or inspire affections.

*Id.* at 40.

49. Steven Garansky & Burt S. Barnow, *Demonstration Evaluations and Cost Neutrality: Using Caseload Models to Determine the Federal Cost Neutrality of New Jersey's REACH Demonstration*, 11 J. POL'Y ANALYSIS & MGMT. 624 (1992).

50. THE WHITE HOUSE, *supra* note 47, at 4.

51. Butler, *supra* note 46, at 10. Lest we view this as totally a Republican phenomenon, former Democratic Representative Chester Atkins of Massachusetts echoed similar leanings:

In Washington, the crisis of welfare dependency remains a matter for seminars, panel discussions, symposia, conferences, hearings and departmental review. But in the states, liberals and conservatives alike are engaged in developing and implementing innovative plans . . . .

Chester G. Atkins, *Prometheus Bound: Democrats in Washington's Era of Limits*, Speech to the Heritage Foundation, Washington, D.C. (Sept. 25, 1986), *quoted in* DOMESTIC POLICY COUNCIL LOW INCOME OPPORTUNITY WORKING GROUP, *supra* note 48, at 42; *see also* 132 CONG. REC. S5077 (1986) (statement of Sen. Daniel Patrick Moynihan).

ty Advisory Board<sup>52</sup> signaled a major departure from previous waiver practice. The Wisconsin Learnfare proposal "sanctioned," or reduced, AFDC benefits to families in which teenage AFDC dependents and AFDC teen parents failed to attend high school. Rather than establishing proven support programs to keep kids in school, Learnfare punished welfare families whose children were truant or dropped out.<sup>53</sup> For the first time, a waiver was granted to allow a reduction in AFDC benefits solely to affect the "deviant" behavior of welfare families outside of a labor market context.

The Bush Administration continued to expand the waiver provision, encouraging states to submit waivers so long as they were cost-neutral to the federal government.<sup>54</sup> Similarly, President Clinton favors broad state discretion and flexibility to redesign welfare programs.<sup>55</sup> His Administration has approved numerous waivers,<sup>56</sup> including an eleven-year Wisconsin "experiment" which terminates a family's entire AFDC grant after twenty-four months even if the parent wants to be in the labor market but is unable to find a job.<sup>57</sup>

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52. For a summary of waivers processed in 1987-1988 by the Low Income Opportunity Advisory Board, see Michael E. Fishman & Daniel H. Weinberg, *The Role of Evaluation in State Welfare Reform Waiver Demonstrations*, in EVALUATING WELFARE AND TRAINING PROGRAMS 119 (Charles F. Manski & Irwin Garfinkel eds., 1992).

53. Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 726-36 (1992) (discussing how Learnfare fails to meet its articulated goals).

54. See *infra* part III for documentation of waivers granted and *infra* text accompanying notes 134-38, for discussion of cost-neutral policy. In his State of the Union address in January 1992, President Bush signaled that he intended to make processing waivers easier and quicker in order for states to implement programs requiring welfare recipients "to seek work, education, or job training," "to get their lives in order," "to hold their families together and refrain from having children out of wedlock," and "to obey the law." George Bush, Address Before a Joint Session of the Congress on the State of the Union, 28 WEEKLY COMP. PRES. DOC. 170, 176 (Feb. 3, 1992). Later in 1992, the Bush Administration set up a federal interagency review process similar to the Low Income Opportunity Advisory Council "to encourage States to design and test potential improvements" and "to open Federal research and demonstration activities up to . . . a wide range of proposals" if the demonstration would be rigorously evaluated and would be cost-neutral to the federal government benefit programs. OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1993 418-20 (1992).

55. President Clinton has stated:

We need to encourage experimentation in the states. I will say again what you know so well: there are many promising initiatives right now at the state and local level, and we will work with you to encourage that kind of experimentation. I do not want the federal government, in pushing welfare reforms, based on these general principles, to rob you of the ability to do more, to do different things. *President Clinton Address to the National Governors' Association*, REUTER TRANSCRIPT REP., Feb. 2, 1993. The President said he would approve waivers that he did not necessarily agree with as long as the experiments were measured honestly. *Id.* The current Administration has continued the policy that the projects must be cost-neutral, although they assess cost neutrality over the life of the project rather than from year to year. U.S. Dep't of Health and Hum. Serv., Press Release, HHS NEWS, Aug. 18, 1993 (on file with author).

56. See DEPARTMENT OF HEALTH AND HUMAN SERVICES, ANNUAL REPORT OF SECTION 1115 AFDC RESEARCH AND DEMONSTRATION PROJECTS IN FISCAL YEAR 1993—INFORMATION (1993) (on file with author) and *infra* notes 95, 99, 101 for documentation of waivers granted.

57. Letter from Mary Jo Bane, Assistant Secretary for Children and Families, Department of Health and Human Services, to Gerald Whitburn, Secretary, Wisconsin Department of Health and Social Services (Nov. 1, 1993) (on file with author) (approving the Wisconsin "Work Not Welfare" demonstration project).

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### *B. Removal of Protection for Subjects of Experimentation by HHS's Abandonment of Independent Review*

While shifting its section 1115 policy from approval of beneficent demonstration projects to executive rescission of congressionally established welfare eligibility criteria, HHS also eliminated regulations providing for independent procedural protections normally mandated in research projects to protect AFDC mothers and children from harm.

In 1971, HEW developed a subregulatory policy to protect human subjects involved in all of its grants or contracts, including section 1115 projects.<sup>58</sup> These protections included a review by an independent committee, subsequently termed the "Independent Review Board" (IRB),<sup>59</sup> of the institution applying for any project in which human subjects "may" be at risk.<sup>60</sup>

In promulgating the policy in the form of regulations in 1974,<sup>61</sup> HEW concluded that requiring that the committee include members who are not employees of the institution applying for the project "is an *essential protection against the development of insular or parochial committee attitudes*, that it assists in maintaining community contacts, and would augment the credibility of the committee's independent role in protection of the subject."<sup>62</sup> If the project placed the subjects at risk,<sup>63</sup> participation had to be limited to those who had given legally effective informed consent.<sup>64</sup> These regulations applied to "sociological" as well as physical or psychological harm.<sup>65</sup> From 1974 to 1983, HEW generally applied these human services protections to section 1115 waiver projects.<sup>66</sup>

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58. U.S. DEP'T OF HEALTH, EDUC., & WELFARE, GRANTS ADMINISTRATION MANUAL, TN 71.6, chap. 1-40 (April 15, 1971); U.S. DEP'T OF HEALTH, EDUC., & WELFARE, THE INSTITUTIONAL GUIDE TO DHEW POLICY ON PROTECTION OF HUMAN SUBJECTS, DHEW PUBLICATION NO. (NIH) 72-102 (Dec. 1, 1971).

An individual was considered to be at risk "if he may be exposed to the possibility of harm—physical, psychological, sociological, or other—as a consequence of any activity which goes beyond the application of those established and accepted methods necessary to meet his needs." GRANTS ADMINISTRATION MANUAL, *supra*, § 1-40-10B.

59. The National Research Act of 1974, Pub. L. No. 93-348 § 212, 88 Stat. 342, 353 (codified as amended in scattered sections of 42 U.S.C.), with subsequent regulatory revision, 40 Fed. Reg. 11,854 (1975).

60. GRANTS ADMINISTRATION MANUAL, *supra* note 58, § 1-40-20A.

61. 39 Fed. Reg. 18,914 (1974) (codified at 45 C.F.R. § 46).

62. 39 Fed. Reg. 18,914, 18,915 (1974) (emphasis added).

63. With no explanation, the final regulations added to the definition of "subject at risk" a requirement that the potential injury increase "the ordinary risks of daily life." 39 Fed. Reg. 18,914, 18,917 (1974) (codified at 45 C.F.R. § 46.3(b)).

64. *Id.* (codified at 45 C.F.R. § 46.2(b)(3)).

65. 38 Fed. Reg. 27,882 (1973).

66. See discussion of extensive review and consent in David N. Kershaw, *Comments*, in Robert M. Veatch, *Ethical Principles in Medical Experimentation*, in ETHICAL AND LEGAL ISSUES OF SOCIAL EXPERIMENTATION 59 (Alice M. Rivlin & P. Micheal Timpane eds., 1975). *But see* Crane v. Mathews, 417 F. Supp. 532, 545 (N.D. Ga. 1976) (Department of Health, Education, and Welfare representation to the court that it "has never resolved the question whether § 1115-type projects should be included within

However, in 1976, in response to *Crane v. Mathews*,<sup>67</sup> which upheld the applicability of the protection of human subjects regulations to section 1115 waiver projects, HEW attempted to narrow the group of people protected by these regulations. In a notice of interpretation of "Subject at Risk," it stated that the regulations:

were not, and have never been, intended to protect individuals against the effects of research and development activities directed at social or economic changes, even though those changes might have an impact on the individual. More particularly, they were not designed to protect against possible financial injury which may result from alteration in the price, availability, or conditions of eligibility for benefits or services offered under a governmental program.<sup>68</sup>

According to HEW, examples of research projects that would not place someone "at risk" included ones in which:

some welfare recipients report more frequently than others their income for purposes of determining their eligibility for, or the amount of, their welfare benefit, or a requirement that some but not all able-bodied welfare recipients work as a condition of eligibility for welfare, or a diminution in the level of welfare benefits (within prescribed boundaries) payable to some but not all similarly situated welfare beneficiaries, or a requirement that some but not all welfare recipients make a co-payment toward the cost of governmentally-financed medical care . . . .<sup>69</sup>

The Carter Administration had considered extensively whether to exempt section 1115 waivers from Institutional Review Board oversight.<sup>70</sup> However, on January 26, 1981, just as the Reagan Administration was taking office, HHS expressly decided not to rescind those protections and instead provided

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the purview of 45 C.F.R. Part 46," although it had decided that parts of the project in question were within the scope of the regulations).

67. 417 F. Supp. 532 (N.D. Ga. 1976).

68. 41 Fed. Reg. 26,572 (1976). This interpretation was published two weeks after the decision in *Crane*, 417 F. Supp. 532. In that case, HEW granted § 1115 waivers to allow Georgia to test the behavioral response of recipients to economic disincentives by imposing \$2-25 copayments on Medicaid recipients for doctor's visits. In finding that the project involved human subjects, the court stated:

The Georgia copayment project has the effect of diminishing the amount of money that a family might have available for basic living needs and forces the family to make a determination whether to apply that money to basic living needs or to apply it to purchase medical care. Such an activity in which human beings, defined in the Social Security Act as the categorically needy, are required to pay for medical care in a situation in which they could not otherwise be statutorily required to pay for such care and would not otherwise have to apply income to that need, is an activity which "deliberately and personally imposes" upon those human beings.

417 F. Supp. at 546. The court refrained from reaching the issue of whether the subjects were "at risk," but required that the project be submitted to an Institutional Review Board for such a determination. HEW's subject-at-risk interpretation seems to be either an attempt to influence the judicial or the IRB decision. Lon Mullen, *Human Experimentation Regulations of HEW Bar Georgia Medicaid Cutoff*, CLEARINGHOUSE R., Aug. 1976, at 259-60.

69. 41 Fed. Reg. 26,572-73 (1976).

70. HEW had proposed an exemption for large scale research on the "effects of proposed social or economic change," from Part 46 in 1979. 44 Fed. Reg. 47,688, 47,692 (1979).

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that an IRB which reviewed a project could waive or modify the informed consent requirement in certain situations.<sup>71</sup> HHS explicitly stated that no evidence had been presented to support the contention that IRB review and approval impeded social science research.<sup>72</sup> Shortly thereafter, HHS confirmed its position: "We believe that IRB review of such evaluation research involving human subjects is appropriate even where, and perhaps particularly where, informed consent is not required,"<sup>73</sup> and stated that the previous "subject at risk" interpretation did not apply to the 1974 regulations which required informed consent for sociological as well as physical harm.<sup>74</sup>

This affirmation of independent protections for section 1115 research subjects was in response to the findings and recommendations of two influential national commissions established by Congress to identify the basic ethical principles that should underlie biomedical and behavioral government research. The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research had stated:

The Commission's deliberations begin with the premise that investigators should not have sole responsibility for determining whether research involving human subjects fulfills ethical standards. Others, who are independent of the research, must share this responsibility, because investigators are always in positions of potential conflict by virtue of their concern with the pursuit of knowledge as well as the welfare of the human subjects of

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71. 46 Fed. Reg. 8370 (1981). The final regulations stated that "IRB review of studies of federal, state, or local benefit or service program is appropriate even where it may be impracticable to obtain the informed consent of the subject." 46 Fed. Reg. 8366, 8383 (1981). However, the regulations allowed the IRB to modify or waive the informed consent requirement if the IRB documented that (1) the demonstration was of a benefit or service program and the research could not be carried out if consent was required, or (2) "the research involves no more than minimal risk to the subjects" and "the waiver . . . will not adversely affect the rights and welfare of the subjects." 46 Fed. Reg. 8366, 8390 (1981) (codified at 45 C.F.R. §§ 46.116(c), (d)).

72. 46 Fed. Reg. 8366, 8370 (1981).

73. Letter from Charles R. McCarthy, Director, Office for Protection from Research Risks, Department of Health and Human Services, to Barbara Mishkin, Deputy Director, President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (Feb. 26, 1981), in *PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, IMPLEMENTING HUMAN RESEARCH REGULATIONS: THE ADEQUACY AND UNIFORMITY OF FEDERAL RULES AND OF THEIR IMPLEMENTATION* 174 (1983).

The protections resulting from this procedure became evident in the aftermath of the decision in *Crane*, discussed *supra* note 68. The IRB disapproved the project, determining that a substantial risk of physical harm existed because poor people would fail to receive medical treatment, that the benefits of the project did not outweigh the risks, and that the research design was "so seriously inadequate that it would be very unlikely to provide any accurate or reliable information upon which to base policy decisions regarding Medicaid copayments." *Institutional Review Boards: Report and Recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research*, 43 Fed. Reg. 56,174, 56,197 (1978).

74. Letter from Charles McCarthy to Barbara Mishkin, *supra* note 73. In promulgating the regulations and incorporating the recommendation of the National Commission, HHS had stated that "minimal risk" involved "those risks encountered in the daily lives of the subjects of the research," 46 Fed. Reg. 8366, 8373 (1981), thus rejecting the "subject at risk" interpretation of the "normal experiences which other Americans can expect to encounter in their daily lives." 41 Fed. Reg. 26,572, 26,573 (1976).

their research.<sup>75</sup>

Subsequently, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research stated that an exemption for "social, economic, or health service research conducted under governmental aegis" from the requirements of the human subjects regulations should be granted *only* when "*the research involves no limitation or withholding of a benefit to which the subjects are legally entitled or which other individuals, similarly situated, continue to receive under the program being evaluated.*"<sup>76</sup>

However, only one year later, the Reagan HHS decided to remove all Medicaid cost-sharing demonstration projects such as the copayment project involved in *Crane v. Mathews* from *any* IRB review. HHS specifically stated that escalating Medicaid costs required this change.<sup>77</sup> Shortly thereafter, HHS totally exempted all section 1115 projects from an independent IRB review.<sup>78</sup> The stated reason was that section 1115 projects were subject to review by HHS officials anyway and were different from "biomedical and behavioral" research.<sup>79</sup>

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75. 43 Fed. Reg. 56,174, 56,175 (1978). The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (established by the National Research Act of 1974, P.L. No. 93-348, 88 Stat. 342), had earlier recommended that HEW require IRB review of "all research involving human subjects that is subject to federal regulation," 43 Fed. Reg. 56,174, 56,176, Recommendation (1)(A) (1978), and that informed consent of participants be required and documented whenever anything more than "minimal risk" is present. *Id.* at 56,179-81, Recommendation (4). The Commission found that IRB review is "the primary mechanism for assuring that the rights of human subjects are protected." 44 Fed. Reg. 47,688, 47,689 (1979).

The Commission's recommendations were later issued as an HEW publication. THE NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, REPORT AND RECOMMENDATIONS: INSTITUTIONAL REVIEW BOARDS (1978).

76. Letter from Morris B. Abram, Chairman, President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, to Patricia Roberts Harris, Secretary, Department of Health and Human Resources [sic] app. at 5 (Sept. 18, 1980) (emphasis added) (on file with author).

77. Notice of Waiver, 47 Fed. Reg. 9208 (1982). Although the IRB, following the *Crane* decision, determined that a substantial risk was present in even a \$2 copayment proposal, *supra* note 73, HHS stated that IRB review was unnecessary since "the possibility of any risk arises solely from the modification of benefits or the means of obtaining benefits" which is "clearly authorized by, and inherent in the concept of demonstration projects conducted under section 1115." *Id.* This regulation was immediately circumscribed by Congress. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 367 (codified as amended at 42 U.S.C. § 13960 (1988)).

78. 48 Fed. Reg. 9266 (1983).

79. With no evidence to contradict its previous finding, *supra* text accompanying notes 70-74, HHS stated that the independent IRB review was duplicative and burdensome, and that eliminating it was necessary to speed up the approval process. In addition, HHS stated that the ethical questions arising from biomedical and behavioral research were unnecessary to research changing benefit levels. 48 Fed. Reg. 9266, 9268 (1983).

It has been noted that the HHS Under Secretary at the time had designed the § 1115 California Medicaid cost-sharing experiment under then Governor Reagan, which was challenged in *California Welfare Rights Org. v. Richardson*, 348 F. Supp. 491 (N.D. Cal. 1972), and fully understood the impact of independent IRB review on broad-based state discretion. Sara Rosenbaum, *Mothers and Children Last: The Oregon Medicaid Experiment*, 18 AM. J.L. & MED. 97, 121 n.117 (1992).

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Rejecting the opinion of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research that some form of independent IRB review was necessary,<sup>80</sup> HHS stated that only agency personnel, under an obligation set forth in Appropriations Act riders,<sup>81</sup> would review each section 1115 request to determine whether it presented "a danger to the physical, mental or emotional well-being of a participant."<sup>82</sup> The Commission strongly disagreed with HHS's contention that no risks exist for the people involved in social policy experiments,<sup>83</sup> noting that research projects covered by the proposed exemption can create medical risks as well as risk of nonphysical intrusions into personal or confidential matters and that such risks should be considered by an IRB.<sup>84</sup> Indicative of the need for independent rather than solely agency review, HHS has recently taken the position that, "as a matter of law," demonstration projects that reduce public assistance do not constitute a danger to welfare families.<sup>85</sup>

Thus, through both executive encouragement of broad-based and wide-

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80. The Commission noted that IRB review was not duplicative of HHS review unless the HHS process included persons with no interest in the outcome of the research and qualifications for evaluating ethical aspects of the project. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Comments of the President's Commission on the Department of Health and Human Services' March 22, 1982, Notice of Proposal to Exempt Certain Research Projects from 45 CFR 46 (April 21, 1982), in *IMPLEMENTING HUMAN RESEARCH REGULATIONS: THE ADEQUACY AND UNIFORMITY OF FEDERAL RULES AND OF THEIR IMPLEMENTATION*, *supra* note 73, at 177.

81. Each fiscal year appropriation for HHS from 1974 to 1993 included a provision that funds appropriated to HHS must not be used for:

any research program or project . . . of an experimental nature, or any other activity involving human participants, which is determined by the Secretary or a court of competent jurisdiction to present a danger to the physical, mental or emotional well-being of a participant or subject of such program . . . without the written, informed consent of each participant . . .

Added by floor amendment offered by Senators Buckley and Biden. 120 CONG. REC. S31,596-98 (daily ed. Sept. 18, 1974). Most recent provision for fiscal year 1993 contained in Departments of Labor, Health and Human Services and Education and Related Agencies Appropriation Act of 1993, Pub. L. No. 102-394, § 211, 106 Stat. 1812 (1992), codified at 42 U.S.C. § 3515b.

In proposing the appropriations rider, Senator Biden specifically stated that the language of the rider expanded the "coverage of existing HEW regulations to include activities carried out by HEW itself," and that the requirement of informed consent applied to "any program or project which has been determined to present a danger to the physical, mental, or emotional well-being of the participant." 120 CONG. REC. S31,597 (emphasis added). This section has recently been held to apply to projects approved through § 1115 waivers. *Beno v. Shalala*, No. S-92-2135, slip op. at 21 (E.D. Cal. July 1, 1993) (appeal pending).

82. 48 Fed. Reg. 9266, 9270 (1983).

83. *IMPLEMENTING HUMAN RESEARCH REGULATIONS: THE ADEQUACY AND UNIFORMITY OF FEDERAL RULES AND OF THEIR IMPLEMENTATION*, *supra* note 73, at 178.

84. 48 Fed. Reg. 9266, 9268 (1983). The Commission recommended that all research projects which limited or reduced benefits be subject to an independent IRB review. *Id.*

85. *Beno v. Shalala*, No. S-92-2135, slip op. at 23. (E.D. Cal. July 1, 1993). This litigation challenged the "work incentive" component of a proposed California demonstration project, decreasing AFDC benefit levels by 1.3%, and waiving limits on earned income (the other component of the project imposed a one year residency requirement limiting benefits to the amount the applicant would have received in her state of prior residence; its application was enjoined in *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993)). While denying the plaintiffs' motion for a preliminary injunction, the district court rejected HHS's position that benefit reduction does not endanger recipients, stating that the language and history of the safeguards for human research subjects in HHS's Appropriations Act and 45 C.F.R. § 46 do not expressly exempt financial harm from the definition of danger. *Id.*



ranging state AFDC experimentation as well as the restriction of independent protections for the AFDC mothers and children who are the subjects of such experiments,<sup>86</sup> HHS has turned a carefully regulated federal entitlement program into a group of highly discretionary state programs.

### III. RESULT OF EXPANDED STATE EXPERIMENTATION

The federal government's willingness to approve virtually any cost-neutral state demonstration project has led to a stampede of such proposals, many of which result in reduced subsistence benefits for welfare recipients.<sup>87</sup> These fall into a number of categories, including Learnfare (reducing benefits if a child has too many school absences or fails to maintain a certain grade average), Family Cap (denying increased benefits for additional children conceived while on AFDC), family planning (requiring Norplant injection as an eligibility criteria for benefits), immunization (reducing benefits for failure to get children immunized or to seek regular medical care), migration restrictions (reducing AFDC benefits for people who move from one state to another),<sup>88</sup> Workfare (reducing benefits if recipients do not work for their benefits), and across-the-board AFDC benefit cuts.<sup>89</sup>

Viewed as a whole, these programs reveal an extremely disturbing trend—states using AFDC as a punitive stick to attempt to affect the behavior of “deviant” welfare recipients, and the federal government indiscriminately approving section 1115 waivers for other than true experimental projects. The underlying assumption is that any change in a welfare rule constitutes welfare reform, and any policy change can be justified as an experiment. By focusing solely on long-term AFDC recipients<sup>90</sup> and erroneously viewing them as the

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86. There are, of course, additional difficulties with an internal process—for example, lack of public notice and opportunity to comment, lack of articulated and reviewable findings regarding harm to recipients, but a detailed discussion of those problems is beyond the scope of this Article.

87. Summaries of all waivers in 1991 and 1992 are contained in MICHAEL WISEMAN, *THE NEW STATE WELFARE INITIATIVES* 13-18, 30-33 (The Institute for Research on Poverty & The Robert M. La Follette Institution of Public Affairs, Discussion Paper No. 1002-93, 1993); JODIE LEVIN-EPSTEIN & MARK GREENBERG, *CENTER FOR LAW AND SOCIAL POLICY, THE RUSH TO REFORM: 1992 STATE AFDC LEGISLATIVE AND WAIVER ACTIONS* 1 (1992); *CENTER ON SOCIAL WELFARE POLICY AND LAW, REPORT ON AFDC § 1115 APPLICATIONS SUBMITTED TO HHS FROM JANUARY 1992—JANUARY 1993* (Pub. No. 169, 1993).

88. Historically, differences in welfare payments have been viewed as a factor contributing to increasing populations in northern urban slums. DANIEL P. MOYNIHAN, *The Crises in Welfare*, *PUB. INTEREST*, Winter 1968, at 3, 28; JAMES TOBIN & W. ALLEN WALLIS, *WELFARE PROGRAMS: AN ECONOMIC ANALYSIS* 16 (American Enterprise Institute for Public Policy Research, Rational Debate Seminars, 1968).

89. LEVIN-EPSTEIN & GREENBERG, *supra* note 87, at 1. The authors also document three areas of state demonstration that improve benefits: allowing a family to retain more of its earnings when a member becomes employed, expanding eligibility for certain two-parent families, and reducing the amount of a stepparent's deemed income when an AFDC parent marries. *Id.* at 30-39.

90. The median stay on AFDC in 1991 was only 21.9 months. *STAFF OF HOUSE COMM. ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS/1993 GREEN BOOK: BACKGROUND MATERIAL AND*

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vast bulk of the urban underclass,<sup>91</sup> policymakers view changing the behavior of this small subgroup as the basis for solving broader societal problems.<sup>92</sup>

As I have observed elsewhere,<sup>93</sup> many of these behavioral modification programs have little substantive merit. They simply do not work as a mechanism to change welfare recipients' behavior. In addition, many of the demonstration projects do not meet the standard social science criteria for the design and implementation of an experimental program.<sup>94</sup>

For example, projects have been routinely approved that cover the entire state AFDC population instead of being limited to the statistically significant number of subjects needed for an experimental and a control group.<sup>95</sup> This

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DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMM. ON WAYS AND MEANS, 103d Cong., 1st Sess. 697 (1993) [hereinafter 1993 GREEN BOOK]. Recent state studies have shown that the median stay on AFDC for new entrants is one year or less, that more than two-thirds of new entrants leave the system within two years, and that less than 15% of new entrants will receive AFDC continuously for five years. MARK GREENBERG, CENTER FOR LAW AND SOCIAL POLICY, BEYOND STEREOTYPES: WHAT STATE AFDC STUDIES ON LENGTH OF STAY TELL US ABOUT WELFARE AS A "WAY OF LIFE" vi (1993).

91. Long-term AFDC recipients living in poverty areas make up only 2.9% of the U.S. poverty population. Erol R. Ricketts & Isabel V. Sawhill, *Defining and Measuring the Underclass*, 7 J. POL'Y ANALYSIS & MGMT. 316, 319 (1988).

92. Although reducing welfare "dependency" has become the driving force in both the rhetoric and implementation of welfare reform, very little empirical research has been done to illuminate the causes of long-term AFDC receipt. STATES UPDATE (Center for Law and Social Policy), Oct. 9, 1992, at 7. While we know that short-term AFDC mothers are better educated, more likely to have been married, have been employed more recently, and have not had their first child while a teenager, we know little of what barriers are faced by long-term AFDC mothers. Douglas J. Besharov, *Targeting Long-Term Welfare Recipients*, in WELFARE POLICY FOR THE 1990S, 146, 151-54 (Phoebe H. Cottingham & David T. Ellwood eds., 1989); DAVID T. ELLWOOD, TARGETING "WOULD-BE" LONG-TERM RECIPIENTS OF AFDC 30, 42, 50 (1986). For example, a study of the 1983-84 National Survey of Income and Program Participation has indicated that over 20% of female AFDC heads of household under age 45 are disabled, but are not receiving the more generous disability program, Supplemental Security Income. MICHELLE ADLER, DEP'T OF HEALTH & HUMAN SERVICES, HEALTH AND DISABILITY STATUS OF AFDC FAMILIES (1988); see also ELLWOOD, *supra* at 42-47 (18.4% of recipients report they have a disability which limits work); GREGORY C. WEEKS, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, TARGETING PUBLIC ASSISTANCE 5 (1992) (finding that 16% of Washington AFDC recipients reported a disability in the last 12 months).

Likewise, even though many of the state demonstration projects are designed to test ways of moving recipients into the labor force, a recent Chicago study showed that virtually all welfare recipients are working already, because they are unable to meet basic subsistence needs with the AFDC grant. The authors found that "single mothers do not turn to welfare because they are pathologically dependent on handouts or unusually reluctant to work—they do so because they cannot get jobs that pay better than welfare." Kathryn Edin & Christopher Jencks, *Reforming Welfare*, in JENCKS, *supra* note 1, at 204.

93. Williams, *supra* note 53.

94. See generally Garansky & Barnow, *supra* note 49; WISEMAN, *supra* note 87, at 6-8.

95. For its work-incentive grant reduction project, California has designated 15,000 cases from four counties as the research sample, including 5000 as a control group and 10,000 as a treatment group. Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services, to Eloise Anderson, Director, California Department of Social Services app. at 5-6, ¶¶ 3.6-3.7 (Oct. 29, 1992) (on file with author) (granting waiver approval). This constitutes approximately 2% of the AFDC population of the state. However, all other AFDC recipients in the state have their benefits reduced. See also Letter from Mary Jo Bane, Assistant Secretary for Children and Families, Department of Health and Human Services, to James G. Ledbetter, Ph.D., Commissioner, Georgia Department of Human Resources (Nov. 2, 1993) (on file with author) (granting approval of the Georgia Personal Accountability and Responsibility Demonstration Project); Letter from Jo Anne B. Barnhart to James G. Ledbetter (Nov. 17, 1992) (on file with author) (granting approval of the Georgia Preschool Immunization Project); Letter from Jo Anne B. Barnhart to Carolyn W. Colvin, Secretary, Maryland Department of Human Resources (June 30, 1982) (on file with author) (granting approval of the Maryland Primary Prevention Initiative Dem-

is a particularly critical violation of standard procedures<sup>96</sup> when the experiment involves a reduction in subsistence benefits to mothers and children, many of whom may not meet the necessary qualifications to be part of the experimental group.<sup>97</sup>

Moreover, rather than testing different hypotheses or different approaches to addressing the same hypothesis, virtually identical projects have been approved for multiple states.<sup>98</sup> For example, there are currently five approved projects denying or reducing aid for children born or conceived during the family's receipt of AFDC,<sup>99</sup> two projects that lower benefits for "new" resi-

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onstration Project); Letter from Jo Anne B. Barnhart to Gerald H. Miller, Director, Michigan Department of Social Services (Aug. 25, 1992) (on file with author) (granting approval of the Michigan To Strengthen Michigan Families Demonstration Project); Letter from Joseph R. Antos, Ph.D., Director, Office of Research and Demonstrations, Health Care Financing Administration, Department of Health and Human Services, to Alan J. Gibbs, Commissioner, New Jersey Department of Human Services (July 20, 1992) (on file with author) (granting approval of the New Jersey Family Development Program); Letter from Otis R. Bowen, M.D., Secretary of Health and Human Services, to Richard F. Celeste, Governor of Ohio (June 2, 1988) (on file with author) (granting approval of the Ohio Transitions to Independence Program); Letter from Jo Anne B. Barnhart to Stephen D. Minnich, Administrator, Oregon Department of Human Resources (July 15, 1992) (on file with author) (granting approval of the Oregon JOBS Waiver Project); Letter from Laurence J. Love, Acting Assistant Secretary for Children and Families, Department of Health and Human Services, to Cornelius Hogan, Secretary, Vermont Agency of Human Services (April 12, 1993) (on file with author) (granting approval of the Vermont Family Independence Project); Letter from Wayne A. Stanton, Administrator, Family Support Administration, Department of Health and Human Services, to Timothy Cullen, Secretary, Wisconsin Department of Health and Social Services (Oct. 20, 1987) (on file with author) (granting approval of the Wisconsin Welfare Reform Demonstration); Letter from Jo Anne B. Barnhart, Assistant Secretary for Family Support, Department of Health and Human Services, to Patricia Goodrich, Secretary, Wisconsin Department of Health and Social Services (June 6, 1990) (on file with author) (granting approval of Part II of the Wisconsin Welfare Reform Demonstration).

96. Garansky & Barnow, *supra* note 49, at 632-33 (discussing stronger evaluation design of smaller random assignment). "As a matter of principle, it is clear that the Secretary would abuse his discretion if he were to approve a project . . . by either subjecting an unreasonably large population to the experiment or continuing it for an unreasonably long period." *California Welfare Recipients Org. v. Richardson*, 348 F. Supp. 491, 498 (N.D. Cal. 1972).

In spite of this, the Bush Administration encouraged states to submit "[w]aiver projects [that] include almost all of the programs' participants in a State." THE WHITE HOUSE, ADDING RUNGS TO THE LADDER OF OPPORTUNITY: THE BUSH ADMINISTRATION'S STRATEGY FOR FURTHER WELFARE REFORM 7 (1992).

97. For example, California's grant reduction project is allegedly to test whether reduced benefits and increased earnings disregard will create a work incentive. However, because the grant reduction is applied statewide, recipients deemed unable to work by the state welfare department itself will be subject to the reduced grant, including those who are on AFDC because of a parent's incapacitation (4.6% of AFDC population). CALIFORNIA DEP'T OF SOCIAL SERV., AFDC CHARACTERISTICS SURVEY: STUDY MONTH OF JULY 1992, table 1 (Statistical Services Bureau, Program Information Series Report 1993-03, 1992).

98. While multisite testing may be appropriate where each site is limited in scope and chosen for its differential value (e.g., rural county, urban neighborhood with strong labor market participation), HHS has chosen to approve projects at multiple sites with no finding that each site provides additional evaluative gain. See DAVID GREENBERG ET AL., PRYING THE LID FROM THE BLACK BOX: PLOTTING EVALUATION STRATEGY FOR WELFARE EMPLOYMENT AND TRAINING PROGRAMS 33-36 (Institute for Research on Poverty, Discussion Paper No. 999-93, 1993).

99. Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services, to Russell S. Gould, Secretary, California Health and Welfare Agency (July 14, 1992) (on file with author) (approving the statewide California Welfare Reform Demonstration Project); Letter from Mary Jo Bane, Assistant Secretary for Children and Families, Department of Health and Human Services, to James G. Ledbetter, Ph.D., Commissioner, Georgia Department of Human Resources (Nov. 2, 1993) (on file with author) (approving the statewide Georgia Personal Accountability and Responsibility demonstration project); Letter from Joseph R. Antos, Ph.D., Director, Office of Research and Demonstra-

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dents,<sup>100</sup> and three projects that impose sanctions for failure to receive appropriate immunizations.<sup>101</sup> There are seven approved state waivers to run Learnfare programs, four of which have provisions that specifically target pregnant and parenting teens,<sup>102</sup> and more states continue to pass Learnfare legislation.<sup>103</sup> No Learnfare waiver requests have been denied. The only check on how many states can test the same hypothesis seems to be whether the state legislature will authorize the designated project.<sup>104</sup>

Furthermore, demonstrations are also being approved to test previously studied hypotheses that have been empirically disproved. For example, although research has regularly shown that the level of AFDC benefits does not

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tions, Health Care Financing Administration, Department of Health and Human Services, to Alan J. Gibbs, Commissioner, New Jersey Department of Human Services (July 20, 1992) (on file with author) (approving the statewide New Jersey Family Development Program); Letter from Jo Anne B. Barnhart to Gerald Whitburn, Secretary, Wisconsin Department of Health and Social Services (April 10, 1992) (on file with author) (approving the four-county Wisconsin Parental and Family Responsibility Demonstration Project); Letter from Mary Jo Bane to Gerald Whitburn (Nov. 1, 1993) (on file with author) (approving Wisconsin's two-county Work Not Welfare Demonstration Project).

100. Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services, to Eloise Anderson, Director, California Department of Social Services app. at 1 (Oct. 29, 1992) (on file with author) (approving the statewide California Assistance Payments Demonstration Project); Letter from Jo Anne B. Barnhart to Gerald Whitburn, Secretary, Wisconsin Department of Health and Social Services (July 27, 1992) (on file with author) (approving Wisconsin's six-county Two Tier AFDC Benefit Demonstration Program).

101. Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services, to James G. Ledbetter, Ph.D., Commissioner, Georgia Department of Human Resources (Nov. 17, 1992) (on file with author) (approving the statewide Georgia Preschool Immunization Project); Letter from Jo Anne B. Barnhart to Carolyn W. Colvin, Secretary, Maryland Department of Human Resources (June 30, 1992) (on file with author) (approving the statewide Maryland Primary Prevention Initiative); Letter from Mary Jo Bane, Assistant Secretary for Children and Families, Department of Health and Human Services, to Karen Beye, Executive Director, Colorado Department of Social Services (Jan. 13, 1994) (on file with author) (approving the statewide Colorado Personal Responsibility and Employment Program).

102. Learnfare-related waivers have been approved for California, Maryland, Missouri, Ohio, Oregon, Virginia, and Wisconsin, and waiver requests are pending for Arkansas and Oklahoma. CENTER ON SOCIAL WELFARE POLICY AND LAW, *supra* note 87, at 3.

Those states with provisions targeting pregnant and parenting teens are California, Missouri, Ohio, and Wisconsin. Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services, to Russell S. Gould, Secretary, California Health and Welfare Agency (July 14, 1992) app. at 1-2 (on file with author) (approving the statewide California Welfare Reform Demonstration Project); Letter from Jo Anne B. Barnhart to Gary J. Stangler, Director, Missouri Department of Social Services (Oct. 26, 1992) (on file with author) (approving five-to-seven-school-district program called Missouri People Attaining Self-Sufficiency); Letter from Otis R. Bowen, M.D., Secretary of Health and Human Services, to Richard F. Celeste, Governor of Ohio (June 2, 1988) (on file with author) (approving the statewide Ohio Transitions to Independence Program); Letter from Jo Anne B. Barnhart, Assistant Secretary for Family Support, Department of Health and Human Services, to Patricia Goodrich, Secretary, Wisconsin Department of Health and Social Services (June 6, 1990) (on file with author) (approving the "Learnfare Modification" to Wisconsin's statewide Welfare Reform Demonstration project).

103. In 1993, Mississippi passed such a bill, 1993 Miss. Sess. Laws, ch. 614, and California's legislature authorized its previously approved "Cal Learn" program, 1993 Cal. Legis. Serv. 69.

Likewise, although three Family Cap experiments were currently operational, Georgia passed legislation implementing a family cap during the 1993 session. 1993 Ga. Laws 612.

104. For example, in 1992 Learnfare proposals were introduced but not passed in 15 state legislatures. LEVIN-EPSTEIN & GREENBERG, *supra* note 87, at 10.

affect the size of AFDC families or a recipient's decision to have another child,<sup>105</sup> HHS approved waivers in California, Georgia, New Jersey, and Wisconsin to test just that hypothesis.<sup>106</sup> Similarly, numerous studies in a variety of states have shown that higher AFDC benefit levels are not a significant reason why most families move into a higher-benefit state.<sup>107</sup> However, in 1992, HHS approved waivers for both California and Wisconsin to allow them to pay lower benefits to new residents in order to determine the effect

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105. FAY LOMAX COOK ET AL., CONVERGENT PERSPECTIVES ON SOCIAL WELFARE POLICY: THE VIEWS FROM THE GENERAL PUBLIC, MEMBERS OF CONGRESS, AND AFDC RECIPIENTS 5-40 (Center for Urban Affairs and Policy Research, Northwestern University, 1988); JENCKS, *supra* note 1, at 228 n.55; KRISTEN A. MOORE, POLICY DETERMINANTS OF TEENAGE CHILDBEARING 62 (The Urban Institute, 1980); David T. Ellwood & Mary Jo Bane, *The Impact of AFDC on Family Structure and Living Arrangements*, 7 RES. LAB. ECON. 137-207 (1985); David E. Keefe, *Governor Reagan, Welfare Reform, and AFDC Fertility*, 57 SOC. SERV. REV. 235 (1983); Kristin A. Moore & Steven B. Caldwell, *The Effect of Government Policies on Out-of-Wedlock Sex and Pregnancy*, 9 FAM. PLAN. PERSP. 164 (1977); Mark R. Rank, *Fertility Among Women on Welfare: Incidence and Determinants*, 54 AM. SOC. REV. 296 (1989). In addition, the size of the AFDC family has been significantly declining: In 1969, 32.5% of AFDC families had four or more children, in 1991, only 10.1% did. 1993 GREEN BOOK, *supra* note 90, at 696.

106. See *supra* note 99.

107. For example, a 1993 Alaska survey (the state with the highest AFDC benefits in the United States) found that 33% of new AFDC applicants came to Alaska to be with family, 31% came for work opportunities, 13% had lived in Alaska before, 22% came for other reasons, and only 1% came for state programs. ALASKA DEPT OF LABOR, ALASKA ECONOMIC TRENDS 4-5 (1993); see also DEPT OF HUMAN SERV., WELFARE MIGRATION STUDY: A REPORT TO THE 1991 LEGISLATURE 18 (1991) (concluding that "the AFDC-UP does not attract families to Minnesota," and that "movement in and out of the state does not result in a significant net loss or gain for Minnesota's AFDC caseload"); NEVADA STATE WELFARE DIV., AID TO DEPENDENT CHILDREN PROGRAM RECIPIENT CHARACTERISTICS STUDY 4 (1988) (finding that the two most common reasons welfare recipients gave for moving to Nevada were to be with family (49.1%) and because of a new job (9.1%)); PLANNING AND EVALUATION DIVISION, DEPT OF SOCIAL WELFARE, AID TO FAMILIES WITH DEPENDENT CHILDREN: 1990 APPLICANT SURVEY 25 (1991) (finding that 94% of AFDC applicants surveyed had either lived in Vermont for more than one year, or had lived there before, and that "there does not seem to be any evidence, compelling or otherwise, to indicate that [all but one single parent] came to Vermont to get welfare benefits" and "[f]amily ties are clearly the most important reason for coming to Vermont"); STATE OF CONNECTICUT DEPT OF INCOME MAINTENANCE, 1993 MAGNET SURVEY (1993) (finding that of the 5.7% of respondents who listed higher benefits as the reason they moved to Connecticut more than half had lived there previously); STEVE SMUCKER, FINAL REPORT ON IMMIGRATION TO MICHIGAN BY GA AND ADC APPLICANTS 12 (Michigan Department of Social Services, 1982) (finding that 3.4% of all out of state applicants may have migrated to Michigan for the benefits).

But see Rebecca M. Blank, *The Effect of Welfare and Wage Levels on the Location Decisions of Female-Headed Households*, 24 J. URB. ECON. 186, 188 (1988) (finding that "locational choices of female household heads are significantly affected by welfare-benefit levels . . ."). However, she also finds that "wage differentials are also important," *id.*, and "[i]ndividuals will respond differently to changes in welfare and wage levels depending on their . . . individual characteristics." *Id.* at 207; see also Gary S. Fields, *Place to Place Migration: Some New Evidence*, 61 REV. ECON. & STAT. 21, 31 (1979) (finding that welfare and unemployment benefit levels were significant factors in determining migration flows, but "no consistent aggregate effect of welfare on migration is found," and "[o]f the factors determining migration behavior, this research suggests that perhaps the most important variable is the availability of jobs"); Lawrence Southwick, Jr., *Public Welfare Programs and Recipient Migration*, GROWTH & CHANGE, Oct. 1981, at 22 (noting that higher welfare benefits are shown to be a positive draw toward migration, although "there are a number of nonwelfare variables which induce migration both for welfare recipients and for nonrecipients," and "welfare migrants seem to migrate for many of the same reasons as the nonrecipients migrate," *id.* at 24). Note also that, unlike the studies showing little correlation between welfare benefit levels and migration patterns, none of the studies finding that welfare did have a significant impact on welfare recipients' decisions to move actually asked recipients directly why they moved.

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on mobility decisions of paying AFDC benefits based on the previous state of residence.<sup>108</sup> Studies specific to both of these states had already found this hypothesis inapplicable to the majority of affected recipients.<sup>109</sup>

Additionally, although one of the few restrictions mandated by section 1115 is that waivers must promote the objectives of the relevant statute,<sup>110</sup> demonstrations have been approved which test *no* objective of the Social Security Act. The state residency requirement of the California and Wisconsin projects mentioned above is an example, in that discouraging people from moving interstate does not “encourage the care of dependent children,” “help maintain and strengthen family life,” or help parents “attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.”<sup>111</sup>

The evaluation format of approved projects is also faulty. Too often, these projects are not designed to evaluate critical effects on subjects or to develop data on models that do not involve a reduction in benefits. For example, Wisconsin’s Learnfare demonstration project ultimately provides additional case management and alternative educational placements along with financial disincentives.<sup>112</sup> Nonetheless, the evaluation model does not provide an assessment of whether services without sanctions would have an impact.<sup>113</sup> In

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108. Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services, to Gerald Whitburn, Secretary, Wisconsin Department of Health and Social Services (July 27, 1992) (on file with author) (approving Wisconsin Two-Tier AFDC Benefit Demonstration Proposal); Letter from Jo Anne B. Barnhart to Eloise Anderson, Director, California Department of Social Services (Oct. 29, 1992) (on file with author) (approving the California Assistance Payments Demonstration Project).

109. LEGISLATIVE ANALYST, PUBLIC ASSISTANCE IN CALIFORNIA: FACTS AND FIGURES 52-54 (1984) (“The data . . . [does] not lend support to the theory that California has a larger percentage of its population on AFDC because eligible families are moving to California in order to take advantage of higher grant levels.”); WISCONSIN EXPENDITURE COMM., REPORT OF THE WELFARE MAGNET STUDY COMMITTEE 50-80 (1986) (finding that only one in 683 respondents cited better welfare as the main reason for her migration, although welfare was one of several factors for others). The California project was enjoined from proceeding based on constitutional grounds. *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993).

110. Although waivers need not promote all objectives of the Social Security Act, they must further *some* objective of the Act. *See California Welfare Rights Org. v. Richardson*, 348 F. Supp. 491, 497 (N.D. Cal. 1972).

111. 42 U.S.C. § 601 (1988).

112. Letter from Jo Anne B. Barnhart, Assistant Secretary for Family Support, Department of Health and Human Services, to Patricia A. Goodrich, Secretary, Wisconsin Department of Health and Human Services, and attachments (June 1, 1990) (on file with author) (approving expansion to Learnfare demonstration).

113. Office of Family Assistance, Department of Health and Human Services, Amendments to Wisconsin’s Special Terms and Conditions for its Welfare Reform Demonstration, Part II-Learnfare Modification, Section 5: Evaluation 7-12 (June 1, 1990) (on file with author). Likewise, the evaluation of the Ohio Learnfare program (LEAP) notes that GRADS, a preexisting, state teen parent program, may have helped bolster LEAP’s effects. DAN BLOOM ET AL., MANPOWER DEMONSTRATION RESEARCH CORPORATION, LEAP: IMPLEMENTING A WELFARE INITIATIVE TO IMPROVE SCHOOL ATTENDANCE AMONG TEENAGE PARENTS 57-85 (1991). One county welfare director noted:

In our county, we have had a successful GRADS program; I firmly believe the GRADS staff plays more of a role in keeping kids in school than the money ever will. A point that often gets overlooked, as well, is that a lot of teen parents do not receive AFDC. In our county, the GRADS program, for example, serves 95 students and only about 1/3 of those receive AFDC.

addition, there are many successful dropout prevention programs for AFDC teens that do not reduce benefits. However, no one is evaluating whether these accomplish more than the "Learnfare" model.<sup>114</sup> Of course, unlike the commonly held perception that Learnfare is cost-neutral or saves money, the dropout prevention programs require additional appropriations.<sup>115</sup> Likewise, experiments are approved that test multiple variables without control groups for each variable.<sup>116</sup> Thus, no valid assessment can be made for the effect of each variable on the hypothesis.<sup>117</sup>

Most noticeably absent from virtually all the evaluations is any assessment of the impact on the thousands of women and children who are subject to the reduced subsistence benefits.<sup>118</sup> Rather, the focus is on government cost savings or change in recipient behavior.<sup>119</sup> This is contrary to standard social

I also believe that the sanctions that have been imposed on the AFDC teen mothers have not improved their lives nor their babies lives.

*MDRC Finds LEAP Improves School Attendance*, STATES UPDATE (Center for Law and Social Policy), Apr. 26, 1993, at 7-8. Yet the LEAP evaluation did not assess the impact of GRADS independently of the sanctions. BLOOM, *supra*, at 87-104.

114. *What Do We Learn From Learnfare?*, FAMILY MATTERS (Center for Law and Social Policy), Jan. 1993, at 12-13.

115. Administrative costs for Learnfare in Wisconsin in 1991 were \$7,491,614, without including costs of litigation, state staff assigned to Learnfare, or administrative staff required for fair hearings. *Id.* at 13.

116. Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services, to Russell S. Gould, Secretary, California Health and Welfare Agency (July 14, 1992) (on file with author) (approving California Welfare Reform Demonstration Project, which imposes statewide grant reductions, lower benefits for new residents, Family Cap, Learnfare, and Workfare provisions); Letter from Joseph R. Antos, Director, Office of Research and Demonstrations, Department of Health and Human Services, to Alan J. Gibbs, Commissioner, New Jersey Department of Human Services (July 20, 1992) (on file with author) (approving the New Jersey Family Development Program, which includes both Family Cap and Workfare components); Letter from Laurence J. Love, Acting Assistant Secretary for Children and Families, Department of Health and Human Services, to Cornelius Hogan, Secretary, Vermont Agency of Human Services (April 12, 1993) (on file with author) (approving the Vermont Family Independence Project, which imposes time limits for AFDC, Workfare, and requirements that pregnant and parenting minors live with parents or in a "supervised" setting); Letter from Mary Jo Bane, Assistant Secretary for Children and Families, Department of Health and Human Services, to Gerald Whitburn, Secretary, Wisconsin Department of Health and Social Services (Nov. 1, 1993) (on file with author) (approving the Wisconsin Work Not Welfare Project, which includes time-limited benefits, a Family Cap provision, and Workfare provisions); Letter from Jo Anne B. Barnhart to Gerald Whitburn (April 10, 1992) (on file with author) (approving the Wisconsin Parental and Family Responsibility Project, which includes a Family Cap provision, as well as four different Workfare provisions).

117. WISEMAN, *supra* note 87, at 42 (discussing Wisconsin's Parental and Family Responsibility Initiation), 48-49 (discussing New Jersey's Family Development Program), 50-54 (discussing California's Welfare Reform Demonstration Project).

118. In Maryland alone, 8299 families received reduced grants in July 1993 due to the lack of documentation of a health visit by a child six years of age or under. DEP'T OF HUMAN RESOURCES, STATE OF MARYLAND, DISALLOWANCES RUN DATE (July 2, 1993) (on file with author).

119. For example, Wisconsin received a waiver to study the effect of paying lower AFDC benefits to families who had moved into the state less than six months previously. While the study plan includes interviews to determine why the family moved into Wisconsin, it does not include any assessment of potential hardships faced by the family as a result of receiving reduced benefits. WISCONSIN DEP'T OF HEALTH & SOCIAL SERV., TWO-TIER AFDC BENEFIT DEMONSTRATION PROJECT, APPLICATION FOR FEDERAL ASSISTANCE 25-32 (June 26, 1992) (on file with author). The Vermont Family Independence Project imposes time limits on AFDC as well as stringent work requirements, but does not require any study of the impact of such drastic reductions. VERMONT DEP'T OF SOCIAL WELFARE, FAMILY INDEPENDENCE PROJECT, APPLICATION FOR FEDERAL ASSISTANCE IV-49-59 (Oct. 29, 1992) (on file with author).

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science research practice, which mandates a heightened oversight when children who cannot consent for themselves are involved.<sup>120</sup>

In fact, it appears that in some situations waivers were granted solely as a budget-reduction measure, raising the core question whether we are trying to solve urban problems or only save money. California's across-the-board 5.8% AFDC reduction reputedly tested the hypothesis of whether increased deprivation of subsistence benefits would increase work participation.<sup>121</sup> However, the state's waiver application highlighted the state's fiscal crisis, predicted annual state and county savings of over \$126 million for the grant reduction provision alone, and stated an intended implementation date only three months after the waiver request was first *submitted* for approval.<sup>122</sup> In addition, the demonstration does not require that any job be offered or available to the recipient prior to the reduction, nor that there even be an employable adult in the household.<sup>123</sup>

Consistent with the rhetoric of the Reagan and Bush Administrations and continued under President Clinton, these waiver approvals send the message that states can reduce benefits for the entire state AFDC population on duplicate hypotheses without a design that will provide useful information. This implementation of section 1115 ignores well-established social science procedures, procedures developed specifically to protect the innocent human subjects

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The recent HHS approval of the Wisconsin Work Not Welfare Program, which terminates the entire AFDC grant to families regardless of need, does not require an evaluation report until 4 1/4 years after the project has begun. "Waiver Terms and Conditions," attachment to letter from Mary Jo Bane, Assistant Secretary for Children and Families, Department of Health and Human Services, to Gerald Whitburn, Secretary, Wisconsin Department of Health and Social Services, app. at 12-13, § 3.10 (Nov. 1, 1993) (on file with author).

120. Veach, *supra* note 66, at 41-44.

121. Governor Pete Wilson's original proposal, which received federal § 1115 approval, would have cut the basic benefit for all AFDC families of three by 10% immediately (with no determination of whether anyone in the family was employable) and would have further reduced benefits by 15% six months later for all families with an able-bodied adult. Letter from Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services, to Russell S. Gould, Secretary, California Health and Welfare Agency, app. at 4, §§ 2.2-2.3 (July 14, 1992) (approving the California Welfare Reform Demonstration Project). Following that proposal's defeat in a voter initiative, WISEMAN, *supra* note 87, at 49, the demonstration project ultimately approved, pursuant to a second waiver application, included a 5.8% grant reduction, or \$28 per month for a family of three, for all AFDC families. DEP'T OF HEALTH & HUMAN SERV., HEALTH CARE FINANCING ADMIN., CALIFORNIA WAIVER AUTHORITY (Oct. 29, 1992) (on file with author). Previously, a 5.8% cut had been approved by the state legislature. CAL. WELF. & INST. CODE § 11450.01 (1991). Of that cut, 1.3% was contingent on the federal waiver approval, because it violates Medicaid "maintenance of effort" requirements. Federal law prohibits states from receiving federal Medicaid funding if they reduce AFDC benefits below the level the state paid in May 1988. 42 U.S.C. § 1396a(c) (1988). The cuts were to be implemented in two phases, with the first phase, on October 1, 1992, resulting in an initial 4.5% reduction, and the second phase reducing benefits by 1.3% on December 1, 1992. LEVIN-EPSTEIN & GREENBERG, *supra* note 87, at 42. The California legislature has enacted legislation approving an additional 2.7% cut, which went into effect in September of 1993. S.B. 35, 1st Sess., 1993 Cal. Legis. Serv. 828.

122. CALIFORNIA DEP'T OF HEALTH SERV. & DEP'T OF SOCIAL SERV., APPLICATION FOR FEDERAL ASSISTANCE, PROGRAM NARRATIVE, CALIFORNIA ASSISTANCE PAYMENTS DEMONSTRATION PROJECT 4, 6, 9 (Sept. 16, 1992) (on file with author).

123. See *supra* note 97.



of "reform" experiments.<sup>124</sup> These waivers do not test alternative hypotheses; instead, they drive a huge path through the basic protections of the Social Security Act.<sup>125</sup>

#### IV. STATES ARE NOT THE PROPER FORUM FOR UNRESTRICTED WELFARE REFORM

In a climate of no spending, the rush to approve cost-neutral broad-based state demonstration projects has been heralded as the avenue to true welfare reform. In turn, welfare reform is viewed as the mechanism to solve urban problems.

But the underlying choice to allow states broad and essentially unrestricted discretion to experiment with subsistence benefits is wrong. State and local officials operate under built-in fiscal incentives to control costs as well as political pressures arising from deep-seated myths about welfare recipients. As a result, unrestricted discretion leads to programs that cause substantial harm to women and children, rather than being realistically designed to solve urban problems.<sup>126</sup>

State and local governments have a strong fiscal incentive to reduce benefits based on interstate competition for businesses and wealthy individuals.<sup>127</sup>

The ability of jurisdictions to break the link between taxes and expenditures is limited by the threat of relocation by highly mobile, relatively wealthy individuals. In an effort to attract these relocators, jurisdictions offer selective tax breaks or lower the overall

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124. I do not mean to advocate a scientific model as the only or best approach for social legislation. I do mean, however, to raise serious doubts about the cavalier way in which HHS has changed section 1115 projects from narrow investigative experiments to sweeping social policy revisions. A scientific model with its attendant restrictions is appropriate for experiments under § 1115, but is not necessarily required for all major legislative initiatives.

125. In what has been termed a "political dare," Jason DeParle, *Wisconsin Pledges to Take Own Path on Welfare by '99*, N.Y. TIMES, Dec. 14, 1993, at A1, Wisconsin recently enacted a provision requiring the state to develop and submit to the legislature a complete replacement welfare program for AFDC no later than 1995. WIS. STAT. § 49.19(20) (1993); S.B. 418, 1993 Wisconsin Act 99 §§ 64, 112. A federal waiver would be necessary in order for the state to continue receiving its \$245 million in federal reimbursement. *"Work, Not Welfare" Becomes Law in Wisconsin*, L.A. TIMES, Dec. 14, 1993, at A25.

126. Of course, some state governments have resisted the fiscal and political pressures described herein, and submitted waiver requests which expanded benefits or offered fiscal incentives to effectuate results. See *supra* note 89. However, this does not negate the important role of the federal government in ensuring that states do not implement broad-based demonstration projects that are driven by fiscal and political motivation.

127. "Many who would support a particular progressive tax and spending program in a unitary system may oppose it in hierarchical federalism if the law preempts state 'beggar-my-neighbor' laws which benefit these citizens." Susan Rose-Ackerman, *Does Federalism Matter? Political Choice in a Federal Republic*, 89 J. POL. ECON. 152, 158 (1981).

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burden or progressivity of broad-based taxes. This, then, cripples the ability of the jurisdictions to fund public goods and services through a tax system based on ability to pay.<sup>128</sup>

Although the reality of such wealth relocation is widely disputed,<sup>129</sup> state policymakers' fear of this outmigration is influential in decisions regarding state budget allocations.<sup>130</sup> In addition, since budgetary items, like roads, water supply, sewage, and education are considered essential to retaining corporate personnel, less room remains in the state budget for providing adequate welfare programs.<sup>131</sup> In fact, a "welfare reform" idea may spread from state to state<sup>132</sup> not because it has merit, but because states do not want to lose revenue to other states.<sup>133</sup> On the other hand, the federal government, which need not fear driving away a revenue base, is in a much more objective position to design welfare programs.<sup>134</sup>

The state's fiscal incentives to reduce benefits were heightened by the recession of the early 1980s, which increased state fiscal stress<sup>135</sup> and re-

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128. Therese J. McGuire, *Federal Aid to State and Localities and the Appropriate Competitive Framework*, in COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 153, 155-56 (Daphne A. Kenyon & John Kincaid eds., 1991).

129. H. Brinton Milward & Heidi Hosbach Newman, *State Incentive Packages and the Industrial Location Decision*, 3 ECON. DEV. Q. 203, 205 (1989) (surveying the contradictory studies of whether state tax rates affect industry movement); see also Alberta H. Charney, *Intraurban Manufacturing Location Decisions and Local Tax Differentials*, 14 J. URB. ECON. 184 (1983) (finding that high property tax rates discourage firms from relocating to urban areas, but income tax rates result in a weak disincentive); Dick Netzer, *What Should Governors Do When Economists Tell Them That Nothing Works?*, 9 N.Y. AFF. 19 (1986).

130. Harold Wolman, *Local Economic Development Policy: What Explains the Divergence Between Policy Analysis and Political Behavior?*, 10 J. URB. AFF. 19, 24-27 (1988) (suggesting that local political actors use fiscal incentives to attract industry despite empirical data showing their ineffectiveness because (1) politicians are ignorant of empirical data, and, instead, rely on conversations with local business people who say "taxes make an important difference," (2) the offering has symbolic content to the electorate as a visible response to unemployment, and (3) governments try to match their competitors because they fear the consequences if they are wrong); see also Albert Davis & Robert Lucke, *The Rich-State-Poor-State Problem in a Federal System*, 35 NAT'L TAX J. 337, 341 (1982); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 919, 949-50, 953, 964 (1985).

The flip side of that perception is the fear that if a state provides an adequate AFDC program there will be an influx of poor people to the state. Although questionable, see *supra* note 107, this belief likewise would deter states from requesting waivers that increase benefits. Stewart, *supra* at 926 n.20.

131. Harold A. Hovey, *Interstate Tax Competition and Economic Development*, in REFORMING STATE TAX SYSTEMS 89, 96-97 (Steven D. Gold ed., 1986).

132. See discussion of numerous states testing the same demonstration hypotheses, *supra* text accompanying notes 98-104.

133. Rose-Ackerman, *supra* note 127, at 158. The additional factor of wide disparities in states' revenue capacity and resources argues against decentralization of categorical eligibility, creating an incentive for poorer states or states with a fiscal deficit to reduce eligibility. See Davis & Lucke, *supra* note 130, at 340-41, 345, 351-52.

134. Stewart, *supra* note 130, at 951. Helen F. Ladd & Fred C. Doolittle, *Which Level of Government Should Assist the Poor?*, 35 NAT'L TAX J. 323, 328-29 (1982).

135. Ladd & Doolittle, *supra* note 134, at 329 (finding that "with decentralized financing, increasing welfare burdens at a time of recession would require states to raise taxes in a cyclically counter-productive manner"); see also Steven D. Gold, *The State Fiscal Agenda for the 1990s* (National Conference of State Legislatures 1990), quoted in Robert Greenstein, *Universal and Targeted Approaches to Relieving Poverty: An Alternative View*, in THE URBAN UNDERCLASS 451 n.22 (Christopher Jencks & Paul E. Peterson eds.,

duced federal infusion of money to fund state programs.<sup>136</sup> In addition, the Reagan/Bush section 1115 waiver policy required all demonstrations to be cost-neutral,<sup>137</sup> and provided that any overage be borne totally by the states.<sup>138</sup> States therefore had a powerful incentive to reduce benefits or to run programs with short-term savings results; they had no fiscal motivation to test demonstrations with early costs (e.g., more expensive education/training programs) but potential long-term savings.<sup>139</sup>

Moreover, state and local public officials, traditionally closer to their constituents, are more subject to the electorate's political whims and therefore have often been less willing to implement programs that protect and support minority, disenfranchised, and unpopular constituencies.<sup>140</sup>

Today, of course, welfare recipients are becoming the focus of much popular anger. The vast majority of the current American electorate views welfare recipients as African-American urban ghetto-dwellers who are lazy, dysfunctional mothers, having many children to avoid work and to get welfare.<sup>141</sup> This erroneous,<sup>142</sup> racist image is a key reason for welfare's unpopularity.<sup>143</sup> It also explains why many of the state demonstration projects

1991) (noting that from 1976 to 1989, as state spending for Medicaid health care costs skyrocketed, state spending for other benefit programs including AFDC plunged).

136. SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* 159-63 (1992).

137. See *supra* text accompanying notes 48-57.

138. Michael Wiseman, *Welfare Reform in the States: The Bush Legacy*, 15 *FOCUS* 18, 19 (1993). Likewise, any savings could be returned to the states. See discussion of savings return in New Jersey REACH program, Garansky & Barnow, *supra* note 49, at 629.

139. Garasky & Barnow, *supra* note 49, at 626; Wiseman, *supra* note 138, at 20.

140. For example, in the 1960s and 1970s, local officials were notoriously unwilling to assist in school desegregation efforts. *Cooper v. Aaron*, 358 U.S. 1, 19-20 (1958) (finding state officials' hostility to racial desegregation of schools no defense to failure to implement plan); GEORGE METCALF, *FROM LITTLE ROCK TO BOSTON: THE HISTORY OF SCHOOL DESEGREGATION* (1983); J. BRAIN SHEEHAN, *THE BOSTON SCHOOL INTEGRATION DISPUTE: SOCIAL CHANGE AND LEGAL MANEUVERS* (1984). See lengthy litigation in Chicago against local housing authorities which culminated in *Hills v. Gautreaux*, 425 U.S. 284, 287 n.4 (1976) (documenting mechanism used by local officials to perpetuate discriminatory public housing scheme). See also JOEL F. HANDLER, *REFORMING THE POOR: WELFARE POLICY, FEDERALISM, AND MORALITY* 135 (1972).

141. RUTH SIDEL, *WOMAN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* 11 (1986); TOM W. SMITH, *ETHNIC IMAGES* (1990).

142. Only 38.8% of AFDC recipients in 1991 were African-American. 1993 GREEN BOOK, *supra* note 90, at 697. AFDC families have no more children than two-parent families in the general population. *Id.* at 696. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *CURRENT POPULATION REPORTS, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1991* (1992). See note 105, *supra*, for studies showing that AFDC mothers do not have more children in order to increase their grant levels; see also Paul A. Jargowsky & Mary Jo Bane, *Ghetto Poverty in the United States*, in *THE URBAN UNDERCLASS* 235, 251-52 (Christopher Jencks & Paul E. Peterson eds., 1991) (stating that less than nine percent of all poor lived in ghettos in 1979). "It has been estimated that only one poor child in fifty-six is African-American, born of an unmarried teen mother who dropped out of school, and lives in the central city." Corbett, *supra* note 1, at 8 (citing Ronald B. Mincy, *The Underclass: Concept, Controversy, and Evidence*, Paper Presented at IRP-ASPE Conference on Poverty and Public Policy (May 1992)).

143. Both our historical ambivalence about financially assisting the poor and our current frustration that we have not solved poverty add to this unpopularity. Thomas Ross, *The Rhetoric of Poverty: Their Immortality, Our Helplessness*, 79 *GEO. L.J.* 1499, 1509, 1543-44 (1991); Williams, *supra* note 53, at

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attempt to use reductions in AFDC benefits to change the recipient's behavior that is viewed as the cause of broad-based urban problems.<sup>144</sup> State and local politicians know that they can increase their popularity by inflammatory rhetoric<sup>145</sup> and political action that blames welfare recipients for their own situations and thereby permits reduction of benefits.<sup>146</sup> This seems true even when increased expenditures might result in programs that would reduce welfare costs in the long-run.<sup>147</sup>

Indeed, AFDC was nationalized in 1935 partly because local government units were simply not providing sufficient benefits.<sup>148</sup> The reality of local political and economic pressures was recognized as early as the hearings prior to enacting section 1115 initially: "[I]t is helpful to the sound administration of State welfare programs to have basic standards written into the Federal law as a protection against temporary and local pressures."<sup>149</sup>

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721-25, 741-46.

144. While we might think of local control as giving a voice to people's public issues and fantasize local involvement in design of a welfare program as a means of increasing citizen support, people really focus on their private agendas, such as keeping poor people out of their neighborhoods and schools. See generally Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990).

Localist ideology masks local power and hides the privatization of local public life behind the rhetoric of efficiency, participation, community and local self-determination. The contingency of local authority, the linkage of location to wealth, class, race and status and the parochial nature of local political activity are obscured by the nostalgia for the polis and the New England town and by abstract assumptions about the marketplace for municipal services.

Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 452 (1990).

Although local involvement in the design of a welfare program might increase citizen support, the current degree of unreality and political hysteria at a local level about welfare recipients leads to poorly designed reactive programs.

145. "However, the problem with the political incentives created by the waiver option is that most of the political benefits appear to come from the announcement, not the implementation, or indeed the impact, of the reform . . . . As a result, such projects . . . are likely to be driven largely by front-end effects unless encouraged by specific federal initiative or other external factors." WISEMAN, *supra* note 87, at 43. Of course, a federal presence is not a federal panacea. The same myths and biases have infused our national debate regarding welfare reform as well.

146. Richard A. Cloward & Frances Fox Piven, *Punishing the Poor, Again: The Fraud of Workfare*, 1993 NATION 693, 696; see WISEMAN, *supra* note 87, at 23, 43 (discussing conflicts between the politics of demonstration and policy science, and concluding that the need to address political dissatisfaction with the welfare system leads to poorly designed programs).

147. Data from the implementation of the Family Support Act shows that states are not appropriating the state match to obtain the federal funding for the major welfare reform which occurred in 1988. In 1992, states drew down only 65.5% of the available federal matching funds. 1993 GREEN BOOK, *supra* note 90, at 634.

148. The Report of the Committee on Economic Security, submitted to President Franklin D. Roosevelt in 1935, made recommendations leading to the Social Security Act, noting that:

Less than one-half of the local units authorized to grant mothers' aid are actually doing so. Many others are granting amounts insufficient to defend the children involved. Part of this situation is due to indifference, but in part it is due to the poverty of many local governmental units . . . .

PROJECT ON THE FEDERAL SOCIAL ROLE, THE REPORT OF THE COMMITTEE ON ECONOMIC SECURITY OF 1935, 36 (1985).

149. *Hearings, supra* note 17, at 289 (statement of Clark W. Blackburn, General Director, Family Service Association of America) (testifying in opposition to § 107 of the Act, allowing states to do vendor payments when the state has reason to believe that the money is not being used in the best interest of the

In short, contrary to the presumptions underlying the current trend,<sup>150</sup> state and local governments are not in the best position to undertake bold welfare reform.<sup>151</sup> This is not to say that there should be no waivers for state experimentation. Using states as laboratories to experiment with small, statistically significant groups is one way to gather empirical data on improvements in the welfare system. But there must be a strong federal presence in the design, limitations, and analysis of these waiver requests.<sup>152</sup> To serve that function, the federal executive must have clear nonpartisan standards for judging waiver requests,<sup>153</sup> analyzing the empirical data to determine if the premise being tested is sound, defining a base benefit under which no state may fall, and providing for an independent determination of harm and need for informed consent.<sup>154</sup>

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child); see also *id.* at 551 (statement of Joseph Reid, Executive Director, Child Welfare League of America) (testifying that "there is danger in simply giving a blank check to the States," since "there is ample experience which shows that there has been serious abuse by States in some instances by cutting off large numbers of people from relief rolls quite inconsistent with Federal law."). Thus, contrary to the statement of Rep. Atkins, *supra* note 51, when the stakes are the total subsistence benefits of a mother and children, perhaps there is some wisdom to lengthy discussion and assessment in Washington of a proposed change rather than a quick state experiment.

150. Even leading welfare policy analyst David Ellwood, now Assistant Secretary for Planning and Evaluation at HHS, although recognizing that "we simply do not have all the answers about how to transform the welfare system," recommends that states be allowed to phase in never-before-tried major welfare programs:

The politics of the Congress and the uncertainty about the impact and appropriateness of various changes will force a national program to be pale and cautious. But some states will be willing to be quite bold. From them, we can learn about a true transformation of the welfare system.

David T. Ellwood, Major Issues in Time-Limited Welfare 25 (Dec. 2, 1992) (unpublished manuscript, on file with author).

151. Nor does Congress always function analytically. For a discussion of the complexities of the congressional process in enacting social legislation, see Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1549 (1983). I am of course aware of the ongoing federalism debate about the appropriate allocation of power and responsibility in our constitutional system. My purpose here is to criticize the wholesale federal abdication in the § 1115 context. In future articles, I plan to explore more fully how notions of dual or concurrent federalism would play out in the welfare framework.

152. WISEMAN, *supra* note 87, at 11 ("But if there is no larger context of motivation and support for state demonstrations and no sense of what does and does not fit in the 'big picture,' then it is likely that the agenda for reform will be driven solely by state political and fiscal considerations."); see also Robert Greenstein, *supra* note 135, at 438, 440 (arguing that targeted benefit programs are more likely to succeed when they are federally prescribed and funded entitlement programs, noting that the Reagan federal budget cuts in benefits programs in 1981 virtually ceased after 1982 and in many cases began to expand thereafter).

153. In one challenge to a § 1115 waiver, the court noted that the agency's approval pattern should not be used to modify the plain meaning of the statute:

[I]t seems quite plain that the sort of experimental *projects* which are going to be *approved* may be much more closely related to the political and sociological orientation or general policy, of the Administration then in power than with its understanding of what the statute authorizes.

California Welfare Rights Org. v. Richardson, 348 F. Supp. 491, 496 (N.D. Cal. 1972) (emphasis added).

154. HHS has long argued that such a requirement would preclude any experiments which involve a decrease in benefits. Crane v. Mathews, 417 F. Supp. 532, 547 (N.D. Ga. 1976). However, as the court in *Crane* noted, there are ways to devise "incentives to encourage the necessary number of individuals for an experimental sample to consent to participate in a section 1115 project involving diminution of benefits." *Id.* at 547; see also New York State's Child Assistance Program (offering work incentives, assistance with child support enforcement, and case management and counseling), and the RAND Health Insurance Experiment (randomly assigning families to one of 14 experimental insurance plans, at various levels of

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### V. CONCLUSION

Originally, policymakers intended for section 1115 to serve as a vehicle to run demonstrations. These demonstrations were to be limited in scope and were to be designed to improve the situation of recipients. These goals are consistent with the standards considered essential for experimentation in the social science world and should once again serve as the cornerstones of HHS waiver policy.<sup>155</sup>

By interpreting section 1115 waivers overbroadly, HHS has undermined congressionally mandated eligibility criteria and, in so doing, has corrupted the sensitive federalism balance between national and local authority. That balance must be arrived at by legislative consensus, and we cannot allow one agency to corrupt or undercut it. Broad-based state experimentation without adequate evaluative processes and protections for those whose lives are being disrupted is little more than a simplistic political response to the electorate's hostility to welfare recipients. It is not an honest attempt to solve underlying urban problems.

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expense). In both cases, participants gave their consent to be part of the project. WILLIAM L. HAMILTON ET AL., THE NEW YORK CHILD ASSISTANCE PROGRAM: PROGRAM IMPACTS, COSTS, AND BENEFITS 3-24 (ABT Associates Inc., 1993); Kathleen N. Lohr, et al., *Use of Medical Care in the Rand Health Insurance Experiment: Diagnosis and Service-Specific Analyses in a Randomized Controlled Trial*, 24(2) MED. CARE S1, S4 (1986 Supp.).

155. PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, SUMMING UP: FINAL REPORT ON STUDIES OF THE ETHICAL AND LEGAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH 65-76 (1983). "[I]t is the judgment of the Commission that Federal agencies should take seriously their responsibility to assure that the integrity of subjects participating in such research is respected and that the research is conducted in a way that will provide valid answers to important questions about the cost and effectiveness of federally sponsored programs." Abram, *supra* note 76, at 3.